DOCKET

No. 08-992

Title: Jeffrey A. Beard, Secretary, Pennsylvania Department of Corrections, et al., Petitioners

v.

Joseph J. Kindler

Docketed: February 4, 2009

Lower Ct: United States Court of Appeals for the Third Circuit

Case Nos.: (03-9010, 03-9011)

Decision Date: September 3, 2008

Questions Presented

Date	Proceedings and Orders
Nov 21 2008	Application (08A467) to extend the time to file a petition for a writ of certiorari from December 2, 2008 to January 31, 2009, submitted to Justice Souter.
Nov 26 2008	Application (08A467) granted by Justice Souter extending the time to file until January 31, 2009.
Feb 2 2009	Petition for a writ of certiorari filed. (Response due March 6, 2009)
Mar 4 2009	Order extending time to file response to petition to and including April 6, 2009.
Apr 1 2009	Order further extending time to file response to petition to and including April 16, 2009.
Apr 16 2009	Brief of respondent Joseph J. Kindler in opposition filed.
Apr 16 2009	Motion for leave to proceed in forma pauperis filed by respondent.
Apr 20 2009	Form 4 affidavit of indigency filed. (Distributed).
Apr 28 2009	DISTRIBUTED for Conference of May 14, 2009.
May 8 2009	Reply of petitioners Jeffrey A. Beard, Secretary, Pennsylvania Department of Corrections, et al. filed. (Distributed)
May 18 2009	Motion for leave to proceed in forma pauperis filed by respondent GRANTED. Justice Alito took no part in the consideration or decision of this motion.
May 18 2009	Petition GRANTED. Justice Alito took no part in the consideration or decision of this petition.
Jun 17 2009	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including July 24, 2009.
Jul 24 2009	Joint appendix filed. (Jt. Appendix in two volumes) (Statement of costs received.)
Jul 24 2009	Brief of petitioners Jeffrey A. Beard, Secretary, Pennsylvania Department of Corrections, et al. filed.
Jul 31 2009	Brief amici curiae of California, et al. filed.
Jul 31 2009	Brief amicus curiae of Criminal Justice Legal Foundation filed.
Aug 12 2009	The time within which to file respondent's brief on the merits is extended to and including August 31, 2009.
Aug 17 2009	SET FOR ARGUMENT ON Monday, November 2, 2009.
Aug 17 2009	CIRCULATED.
Aug 31 2009	Record received from the U.S.C.A. for the 3rd Circuit. (1 box)
Aug 31 2009	Brief of respondent Joseph J. Kindler filed. (Distributed)
Sep 17 2009	Application (09A285) for an extension of time within which to file petitioners' reply brief on the merits, submitted to Justice Sotomayor (Justice Alito recused).
Sep 25 2009	Application (09A285) granted by Justice Sotomayor for an extension of time within

	which to file petitioners' reply brief on the merits to and including October 6, 2009.
Oct 5 2009	Letter from counsel for the petitioners received.
Oct 6 2009	Reply of petitioners Jeffrey A. Beard, Secretary, Pennsylvania Department of Corrections, et al. filed. (Distributed)
Nov 2 2009	Argued. For petitioners: Ronald Eisenberg, Deputy District Attorney, Philadelphia, PA. For respondent: Matthew C. Lawry, Philadelphia, Pa.

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PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY A. BEARD, et al.
Petitioners

v.

JOSEPH J. KINDLER,
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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Capital Case

Question Presented

After murdering a witness against him and receiving a sentence of death, respondent broke out of prison, twice. Prior to his recapture in Canada years later, the trial court exercised its discretion under state forfeiture law to dismiss respondent's post-verdict motions, resulting in default of most appellate claims. On federal habeas corpus review, the court of appeals refused to honor the state court's procedural bar, ruling that, because "the state court . . . had discretion" in applying the rule, it was not "firmly established" and was therefore "inadequate."

Is a state procedural rule automatically "inadequate" under the adequate-state-grounds doctrine – and therefore unenforceable on federal habeas corpus review – because the state rule is discretionary rather than mandatory?

List of Parties

Petitioners

Jeffrey A. Beard, Secretary, Pennsylvania Department of Corrections

David DiGuglielmo, Superintendent, State Correctional Institution at Graterford

Joseph P. Mazurkiewicz, Superintendent, State Correctional Institution at Rockview

Respondent

Joseph J. Kindler

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Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit, affirming the district court's grant of a conditional writ of habeas corpus, was entered September 3, 2008, is published at 542 F.3d 70, and is reproduced in the Appendix at App. 1-53.

The opinion of the United States District Court for the Eastern District of Pennsylvania, mandating either a new penalty hearing or a sentence of life imprisonment, was entered September 23, 2003, and is published at 291 F. Supp. 2d 323. An excerpt is reproduced in the Appendix at App. 54-66.

Statement of Jurisdiction

This Court has jurisdiction to review the judgment of the court of appeals under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved are the Sixth and Eighth Amendments to the United States Constitution and 28 U.S.C. § 2254.

Statement of the Case

Respondent – a capital murderer convicted of torturing and killing a witness against him in another case – broke out of prison, escaped to Canada, and broke out of prison again. A total of seven years passed before he was finally apprehended and extradited. In the meantime, the state trial judge dismissed respondent's post-verdict motions as a result of his escape, and the state appellate courts upheld the resulting procedural default.

But not the federal court of appeals. When the case reached federal habeas review, that court held that the procedural default was not an adequate state ground, because Pennsylvania's escape rule was discretionary, and thus could not be "firmly established." Accordingly, the federal court reached the merits of claims the state courts never had occasion to address, vacated respondent's sentence of death, and ordered a new penalty hearing a quarter century after the original trial.

The crime dates back to 1982. Respondent committed a burglary. With police converging on the scene, respondent managed to slip away, leaving his accomplice, David Bernstein, to be arrested. Bernstein admitted his role in the crime and identified respondent as the ringleader. App. 89.

Respondent learned that Bernstein would be a witness against him in court. Before trial, respondent proclaimed his intent to kill Bernstein to keep him from testifying. Bernstein, fearing respondent's violence, made plans to move away. App. 90-91.

The day before the move, in July 1982, respondent sent a female friend to Bernstein's apartment to lure him outside. When Bernstein opened the door, respondent dragged him out and beat him repeatedly with a baseball bat. Then he instructed a cohort to strike the victim with an electric prod. Once the victim was incapacitated, respondent dragged him to a car, leaving a bloody trail. App. 91-92.

Respondent stuffed Bernstein in the trunk and drove him to a river. There he tied a cinder block to Bernstein's neck and held him down to fill his lungs with water. App. 92.

Alerted about the abduction by a neighbor, police later found the car respondent had used, along with the bloody baseball bat, the electric prod, and clothing. Bernstein's body eventually surfaced, the cinder block still tied around his neck. He was 22 when he died. App. 80, 92-94.

Respondent was convicted by a jury and sentenced to death in November 1983. Post-verdict motions were filed. But in September 1984,

respondent escaped from the maximum- security wing where had been held, by sawing through a steel bar and breaking out a window. App. 68-69.

The trial court dismissed respondent's post-verdict motions because of his escape. Respondent was not heard from until the following year, when he was arrested in Quebec. He fought extradition while being held in a prison in Montreal. App. 69.

But in October 1986, respondent constructed a rope by tying bed sheets together, broke through a skylight, and escaped again, lowering himself thirteen floors to the ground. A co-conspirator lost his grip on the rope and was killed in the fall. App. 69.

This time respondent remained at large for two years. Finally, after his face was broadcast on "America's Most Wanted," he was identified and arrested in September 1988, in New Brunswick. He fought extradition again. After three years of litigation, the Canadian Supreme Court rejected respondent's challenge, and he was extradited in October 1991. App. 69, 81.

Upon his forced return to Pennsylvania, respondent filed a direct appeal to the Pennsylvania Supreme Court. He asserted that the trial court had abused its discretion in dismissing his post-verdict motions in response to his flight to a foreign country. The supreme court

ruled in 1994 that the trial court had acted properly, and that respondent had therefore waived all claims but those for which review was mandated by statute. The court then considered these mandatory issues: whether the evidence was sufficient to support the finding of guilt and the aggravating circumstances, and whether the sentence was excessive, disproportionate, or arbitrary. Finding no error, the supreme court affirmed the judgment of sentence. App. 82-97.

Two years later, in 1996, respondent filed a petition for post-conviction relief under the Pennsylvania Post-Conviction Relief Act (PCRA). He argued that he was entitled to merits review of all claims. The trial court, applying the waiver and previous litigation provisions of the PCRA, 42 Pa. C.S. § 9544, denied the petition. On appeal, the Pennsylvania Supreme Court affirmed the denial of post-conviction relief in 1998. App. 71-77.

In 1999, respondent filed a federal habeas corpus petition in the Eastern District of Pennsylvania. The district court ruled, in 2003, that it was not bound by respondent's default of his claims in state court, because the state ground was "inadequate." The district court then reviewed respondent's challenges on the merits, granting sentencing relief under *Mills v. Maryland*, 486 U.S. 367 (1988), and rejecting the balance of the claims. App. 54-66.

The parties cross-appealed to the Court of Appeals for the Third Circuit. The appeals court (per McKee, J.) held that the state courts could not validly punish respondent for his repeated escapes by dismissing his claims. The court reasoned that, because state law allowed for discretion to reinstate post-verdict motions following a fugitive's recapture, any exercise of that discretion to deny reinstatement was not the product of a "firm" rule, and therefore could not provide an adequate state ground. Proceeding to the merits, the appeals court upheld the district judge in all respects but one: that he should have vacated respondent's death penalty not just on the *Mills* claim, but also on the ground that trial counsel was ineffective for not finding more mitigation evidence to present. App. 1-53.

Reasons for Granting the Petition

A state procedural rule is not "inadequate" *per se* under the adequate-state-grounds doctrine, and thus unenforceable on federal habeas corpus review, merely because the rule allows for the exercise of discretion in its application to particular facts and circumstances.

This is a case raising a significant question about the contours of the "adequate state grounds" doctrine. Under that principle, federal courts

generally will not review state court rulings in cases involving issues of federal law, if the actual ground for decision rested on a point of state law that was adequate to support the ruling. Development of the doctrine, however, has been uneven, and its application has required this Court's continued attention. *See, e.g., Philip Morris USA v. Williams*, No. 07-1216 (U.S.), argued December 3, 2008; *Cone v. Bell*, No. 07-1114 (U.S.)., argued December 9, 2008.

This case has the potential to help clarify this important area of the law, because it presents a discrete but commonly-arising adequate-state-grounds issue: the role of discretion. *See* 16B C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4026 ("Evasion and Discretion Tests of Adequacy") (2nd ed. 1996). Relying on prior circuit precedent, the Third Circuit Court of Appeals held squarely that a state court's power to exercise discretion in applying a rule of procedure renders that rule inadequate, *per se*, to support the state court judgment. Thus, at the time of respondent's escape,

> Pennsylvania courts had discretion to hear an appeal filed by a fugitive who had been returned to custody before an appeal was initiated or dismissed. Accordingly, the fugitive forfeiture rule was not "firmly established" and therefore was not an independent and adequate procedural rule

> sufficient to bar review of the merits of a habeas petitioner in federal court.

App. 22.

The circuit court's view of the law made it unnecessary to consider anything else about the state rule – in particular, whether its application in any way would have misled a litigant into thinking that he could safely disregard it. To be sure, Pennsylvania courts in this period did not mechanically and uniformly impose forfeiture on all fugitives. There were several published appellate decisions exercising discretion to allow reinstatement of post-verdict motions (albeit in circumstances far less egregious than those here).[1] In other cases, appellate courts upheld trial court dismissals of post-verdict motions after escape, even if the defendant was eventually returned.[2] Thus, while a fleeing felon like respondent might have entertained some slim hope that his multiple

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[1] *Commonwealth v. Galloway*, 333 A.2d 741 (Pa. 1975); *Commonwealth v. Borden*, 389 A.2d 633 (Pa. Super. 1978); *Commonwealth v. Milligan*, 452 A.2d 1072 (Pa. Super. 1982).

[2] *E.g. Commonwealth v. Boyd*, 366 A.2d 934 (Pa. Super. 1976); *Commonwealth v. Lewis*, 446 A.2d 295 (Pa. Super. 1982); *Commonwealth v. Clark*, 446 A.2d 633 (Pa. Super. 1982).

escapes would be excused if he were ever caught, he could hardly have counted on it.

As the court of appeals understands the adequate-state-grounds doctrine, however, none of that mattered. The various Pennsylvania flight cases were cited to the federal court, but were mostly unmentioned in the opinion below. There was no need to do so. Under the court's rationale, the manner in which the state courts exercise their discretion to apply a bar does not matter. It was the mere existence of discretion, *by its very nature*, that rendered the state rule inadequate.

That viewpoint has been soundly criticized:

> The possible implication . . . that discretionary state grounds cannot provide adequate reason to refuse to consider a federal question is unwarranted. There are many valid reasons for framing procedural rules in general, "discretionary" terms. . . . [In applying the adequate-state-grounds doctrine, this] Court should continue to recognize that sound procedure often requires discretion to exact or excuse compliance with strict rules, and ordinarily should leave the discretion to state courts.

16B WRIGHT, MILLER, & COOPER at 385-86, 403.

Nonetheless, federal appeals courts are in disarray on the question. Many decisions, like the Third Circuit's here, have pronounced a general rule that state procedural bars permitting an exercise of discretion are, for that reason, inadequate to support the judgment and preclude federal habeas review.[3]

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[3] *E.g.*, *Doctor v. Walters*, 96 F.3d 675, 685-86 (3rd Cir. 1996) (where state law did not clearly prohibit exercise of discretion to hear defaulted appellate claims, state courts' refusal to do so was not based on adequate procedural rule); *Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995) (once state law eliminated court's discretion to consider successive post-conviction petitions, procedural bar became adequate state ground); *Deitz v. Money*, 391 F.3d 804, 811 (6th Cir. 2004) ("A rule that grants such discretion to the courts is not firmly established and regularly followed so as to be adequate" state ground); *McCalvin v. Yukins*, 444 F.3d 713, 724 (6th Cir. 2006) (if trial judge had discretion to grant untimely suppression motion under state law, then state law did not supply adequate procedural ground for barring federal habeas review); *McKenna v. McDaniel*, 65 F.3d 1483, 1488-89 (9th Cir. 1995) (where state court had power to address plain error, its "refusal to exercise discretion to hear the claim" was not adequate state ground); *Valerio v. Crawford*, 306 F.3d 742, 776-78 (9th Cir. 2002) (state court's "commendable" exercise of discretion to excuse certain defaults in capital cases rendered all procedural bars in capital cases inadequate); *Biehle v. Kerby*,1994 U.S. App. LEXIS 8032, 7-9 (10th Cir. 1994) (unpublished) (because state court has discretion to address defaulted claims, state court's ruling that claim here was defaulted is inadequate ground).

Other decisions – from some of the same circuits, including the Third – say just the opposite:

> In the final analysis, Campbell's argument on "adequacy" boils down to his insistence that a discretionary procedural rule such as Rule 8 cannot be "adequate" for purposes of procedural default. . . . If accepted, this proposition that a state procedural rule is rendered *per se* inadequate merely because it allows for some exercise of discretion by state courts would all but vitiate the long-standing doctrine of procedural default in the federal habeas context.

Campbell v. Burris, 515 F.3d 172, 181 (3rd Cir. 2008).[4]

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[4] *See also Hutchison v. Bell*, 303 F.3d 720, 738-39 (6th Cir. 2002) ("to find that the repeated application of [judicially created "due process" exception to state post-conviction filing deadline] renders the Tennessee statute of limitations an inadequate basis to deny postconviction relief would have the unfortunate effect of discouraging a practice that provides states the opportunity to remedy unconstitutional convictions in cases involving later-arising claims"); *Scott v. Mitchell*, 209 F.3d 854, 868-69 (6th Cir. 2000) (state court's willingness to relax enforcement of default in some capital cases, out of abundance of caution, does not mean "that we are justified here in ignoring its sovereign decision founded upon its own procedural rule"); *Prihoda v. McCaughtry*, 910

(continued...)

The unsettled state of the law concerning adequacy and discretion is at least in part a product of some of the expansive language that this Court has employed in its adequate-state-grounds jurisprudence. *See, e.g., James v. Kentucky*, 466 U.S. 341, 348-49 (1984) (state rule was not "firmly established"); *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964) (state rule must be "strictly or regularly followed"); *Sullivan v. Little Hunting Park*, 396 U.S. 229, 234 (1969) (rule, "more

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[4](...continued)
F.2d 1379, 1385 (7th Cir. 1990) ("The difficulty of drawing lines, especially under standards such as 'sufficient reason,' makes uncertain application inevitable. Uncertainty is not enough to disqualify a state's procedural ground as one 'adequate' under federal law. If it were, states would be induced to make their rules draconian rather than allow prisoners the latitude now available"); *Rogers-Bey v. Lane*, 896 F.2d 279, 284 (7th Cir. 1990) (Manion, J., concurring) ("The fact that the state court has the discretion to disregard procedural defaults where plain error exists does not mean the state loses its right to stand on its procedural rules on collateral attack when the state court decides that no plain error exists. If a state court's review for plain error allowed federal courts to review the merits of issues that would otherwise be procedurally barred, states might become reluctant to exercise their discretion to correct plain errors. This is a result we ought not encourage"); *Murray v. Hvass*, 269 F.3d 896, 899-900 (8th Cir. 2001) (state court's failure to exercise its discretion to review defaulted claim in "interests of justice" was simply a conclusion that justice did not warrant exception to general rule here; "this determination is entitled to respect by our court," and was not inadequate state ground).

properly deemed discretionary than jurisdictional," does not bar review).[5]

Removed from context, these phrases have taken on a talismanic quality, with unfortunate results. Many federal habeas courts have become, in effect, the "rules police," roving through state procedural requirements looking for any degree of wiggle room. Discretionary rules provide an easy target. It is the essence of discretion that it exists on a spectrum. Imprecision is tolerated in order to encourage equitable treatment of particular circumstances that may be difficult to quantify. Under adequate-state-grounds analysis, however, at least as performed by the court of appeals here, such rules are done for. There is simply no way they can be "strictly followed."

The true inquiry should not focus on any such shibboleths. The better question in this context is simply whether the state rule provides the defendant adequate notice and opportunity to conform his conduct to it. That does not require certainty. A lawyer or litigant need not have the capacity to calculate outcomes with scientific precision. If there is a reasonable likelihood that non-compliance will cause a default, and the

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[5] *See also* Brief *Amicus Curiae* of the Criminal Justice Legal Foundation, *Philip Morris USA v. Williams*, No. 07-1216 (U.S.).

defendant nevertheless fails to comply, he should be bound by the consequences. "Adequacy" review should require no more.

This is a compelling case in which to make these points. The notion that a discretionary state rule is automatically inadequate is especially misplaced in the context of fugitive forfeiture. As a class, post-trial defendants contemplating escape are exceedingly unlikely to make decisions based on an evaluation of the probability of overcoming procedural defaults upon their return to custody. By definition, they do not intend to return.

Indeed, this respondent demonstrates dramatically that a state fugitive forfeiture rule creates no unfair uncertainty merely because it is discretionary. It is hard to imagine that any judge would exercise discretion to reinstate respondent's appellate rights under the circumstances here, or that any judge who denied reinstatement would be found to have abused that discretion.

This was, after all, no spur-of-the-moment, impulsive dash for freedom. Rather, respondent's escape from the Philadelphia prison's maximum-security block was laboriously planned and executed by sawing through the steel bar in the window of an adjacent cell. Once outside the walls, he was on his way to Canada – the nearest

jurisdiction that might refuse to extradite a capital murderer. App. 68-69.

The fact that this is a capital case only exacerbates respondent's position. Given the sentence, there was no means to sanction the flight other than forfeiture. A prison term for the crime of escape would have been meaningless.

To make matters worse, when he got to Canada, and was eventually recaptured, respondent did not exactly settle in to serve his time and pursue his legal avenues of relief. Instead, *he escaped again*. This escape was even more egregious than the first: after making a rope of bed sheets, he climbed thirteen stories to the ground, leaving behind a fellow inmate who fell to his death. The second escape, moreover, was *after* the trial judge had already dismissed his post-verdict motions as a result of the first escape. So respondent would have known full well that further flight attempts could hardly help his appeal prospects. App. 69.

Respondent could not possibly have believed, in light of all this, that he would be entitled to walk back into the Pennsylvania courts to pick up just where he had left off. More importantly, he could not possibly have contended that he escaped *in reliance* on any such expectation. There is no satisfactory test for adequate state grounds that could nullify the fugitive forfeiture here.

Yet the court below not only forgave respondent's default – it effectively awarded him a windfall for his flight. That is because, while respondent was on his sojourn, the substantive law was changing, in his favor. The primary ground on which the court of appeals granted respondent sentencing relief was a putative violation of *Mills v. Maryland*, 486 U.S 367 (1988). *Mills* has been the subject of intense litigation in the Third Circuit, and the ruling here, applying circuit precedent, was deeply flawed.[6] But all that should have been irrelevant. Had respondent remained within the jurisdiction of the Pennsylvania courts following his conviction in 1984, his direct appeal would likely have been over, and the judgment final, before *Mills* was even decided. There would never have been any *Mills* claim.[7]

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[6]*See* Petition for Writ of Certiorari of Jeffrey A. Beard, *Beard v. Abu-Jamal*, No. 08-652 (U.S.), filed November 14, 2008, pending .

[7]Respondent may also have profited from his escape in relation to a second legal claim.

After granting relief on the *Mills* issue, the court of appeals went on to address an alternative ground: that trial counsel was ineffective for not finding additional mitigating evidence to present at sentencing. Without the benefit of any evidentiary hearing on the claim, the court credited the affidavits of newly presented mitigation witnesses, who alleged, *e.g.*, that respondent had abusive parents, a head

(continued...)

The irony of "adequacy" relief for respondent's procedural default is compounded by this Court's decision in *Goeke v. Branch*, 514 U.S. 115 (1995). There the Court considered a fugitive forfeiture imposed in circumstances like those here. Although *Goeke* addressed a Fourteenth Amendment Due Process claim rather than

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[7](...continued)
injury, and "narcissistic personality disorder." App. 37-40.

The court acknowledged that trial counsel was no slacker but "a skilled and forceful advocate," who presented five mitigation witnesses to testify about respondent's positive traits and potential value to society. But the court nonetheless credited counsel's post-conviction declaration that it never even occurred to him to investigate further. The court also held that counsel's obvious competence at the trial actually helped prove his ineffectiveness: "the skillful manner in which [counsel] presented the limited evidence that he did have illustrates the potential force of the mitigation evidence that he did not have." App. 41-42.

In the court's view, however, the crucial issue was prejudice. On this point the balance tipped in respondent's favor on the basis of a trio of recent precedents, *Rompilla v. Beard*, 545 U.S. 374 (2005), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2000). App. 42-43. Had respondent presented his mitigation ineffectiveness claim a decade earlier, before these cases were decided, it is far from clear that he would have prevailed. *See Strickland v. Washington*, 466 U.S. 668, 699 (1984) (although counsel failed to perform any investigation of his client's family or psychiatric history, "the lack of merit of respondent's [prejudice] claim is . . . stark").

adequate state grounds, the underlying contentions were much the same: that the imposition of forfeiture on a defendant who had been recaptured before appeal was arbitrary and served no legitimate state interest. Applying the "*Teague*" bar,[8] the *Goeke* Court rejected the claim, holding that there is simply no authority for such a proposition.[9]

Goeke points to a serious anomaly in the operation of the adequate state grounds doctrine in habeas cases like this one. A defendant who mounts a frontal constitutional challenge to a state court procedural bar, on the ground that it is not consistent with due process, must exhaust the claim in state court, overcome *Teague*, and clear the AEDPA deference hurdle. 28 U.S.C, § 2254(d). A defendant who makes the same sort of arguments, but in the guise of an "adequacy" challenge, need do none of that. Yet if he prevails,

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[8] *Teague v. Lane*, 489 U.S. 288 (1989).

[9] *See also Estelle v. Dorrough*, 420 U.S. 534, 539 n.8 (1975) (rejecting equal protection challenge to fugitive disentitlement "statute [that] allows the court in its discretion to reinstate . . . appeals. In the past, the court has both granted leave to reinstate and refused it under a test of 'good cause shown.'"); *see also Ortega-Rodriguez v. United States*, 507 U.S. 234 (1993) (exercising supervisory power to overturn circuit court's rule of mandatory dismissal for pre-sentence escapes, but upholding authority of district courts to exercise discretion to punish such escapes).

he achieves substantially the same result: relief from his default, and the virtual annulment of the state procedural bar in future habeas cases. Because "adequacy" analysis essentially embodies a due process or equal protection inquiry, it should not be used as an end run around the normal requirements of federal habeas corpus review.

One additional line of cases from this Court has implications for the issues presented here. In *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), the Court addressed a circuit conflict concerning AEDPA's "proper filing" requirement, 28 U.S.C. § 2244(d)(2). The dispute turned on the enforceability, on federal habeas review, of various state post-conviction filing deadlines.

Many such deadlines contain exceptions or other provisions that arguably permit courts to exercise some degree of discretion in applying their state time bars. Before *Pace*, one group of circuits had held that, if state courts could exercise such discretion, then the filing deadlines were not really time bars at all, and late petitions could still be considered "properly filed." Circuits on both sides of the split acknowledged the analogy between that time bar issue and the discretionary state grounds question at issue here.[10]

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[10] *Compare Siebert v. Campbell*, 334 F.3d 1018, 1025

(continued...)

Pace resolved the split by requiring federal habeas courts to honor state filing deadlines, whether they were more or less strictly administered by the states. 544 U.S. at 414, 417 ("[W]e hold that time limits, no matter their form, are 'filing' conditions. . . . When a postconviction petition is untimely under state law, 'that is the end of the matter' for purposes of § 2244(d)(2)"); *accord Allen v. Siebert*, 128 S. Ct. 2, 4 (2007) ("The fact that Alabama's [time bar] . . . is subject to equitable tolling . . . renders it no less a 'filing' requirement . . .; it only makes it a less stringent one. . . . Under the Court of Appeals' approach, federal courts would have to delve into the intricacies of state procedural law in deciding whether a postconviction petition rejected by the state courts as untimely was nonetheless 'properly filed' under § 2244(d)(2). Our decision in *Pace* precludes such an approach").

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[10](...continued)
(11th Cir. 2003) ("only rules that are 'firmly established and regularly followed' qualify as adequate state grounds. . . . [T]his standard likewise applies to state procedural rules in the 'properly filed' inquiry under § 2244(d)(2)"), *with Brooks v. Walls*, 279 F.3d 518, 523-24 (7th Cir. 2002) (state procedural bar with discretionary plain error exception is nonetheless an adequate state ground, just as state timeliness rule with discretionary plain error exception is nonetheless a "proper filing" requirement under § 2244(d)(2)).

This deference to state court rulings should inform federal habeas review under the adequate state grounds doctrine as well. States should not be forced to choose between strict, non-discretionary enforcement of their procedural rules, or none at all. The ruling of the court of appeals below should be reviewed.

Conclusion

For these reasons, petitioners respectfully request this Court to grant the writ of certiorari.

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos: 03-9010 & 03-9011

JOSEPH J. Kindler,

Appellee/Cross-Appellant

v.

MARTIN HORN, Commissioner,
Pennsylvania Department of Corrections,
*DAVID DIGUGLIELMO, Superintendent of
the State Correctional Institution at Graterford,
JOSEPH P. MAZURKIEWICZ, Superintendent
of the State Correctional Institution at Rockview,

Appellant/Cross-Appellees

*(Amended Per Clerk's Order dated 1/6/05.)

Appeal from the District Court
for the Eastern District of Pennsylvania
(Civil Action No. 99-cv-00161)
District Judge: Honorable J. Curtis Joyner

App. 2

Argued October 15, 2007

BEFORE: McKEE, FUENTES, and
STAPLETON *Circuit Judges*

(Opinion filed: September 3, 2008;
Amended: September 29, 2008)

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OPINION

McKEE, *Circuit Judge*

Joseph Kindler was sentenced to death after being convicted of the first degree murder of David Bernstein. After unsuccessfully appealing in state court, Kindler filed this habeas petition in district court alleging, *inter alia*, that the trial court's jury instructions violated the Supreme Court's pronouncement in *Mills v. Maryland*, 486 U.S. 367 (1988), and that his trial counsel had been ineffective during the penalty phase of his trial. The district court agreed that Kindler was entitled to relief under *Mills*, and also concluded that he had established two additional claims of prosecutorial misconduct. The court granted relief on those grounds while denying his remaining claims. The Commonwealth appealed, and Kindler filed a cross appeal in which he challenged the district court's denial of his remaining claims for relief.[1] For the reasons that follow, we will affirm the district court's grant of habeas relief based on the Supreme Court's decision in *Mills*. We will reverse the district court's denial of relief based on ineffective assistance of counsel during the penalty phase of the trial. Because we grant Kindler's relief on his

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[1]The claims raised in the appeal and cross-appeal are so closely intertwined that we will address the various claims issue by issue rather than discussing the appeal and cross appeal separately.

ineffective assistance of counsel and *Mills* claims, we decline to review his claims of prosecutorial misconduct.

Ultimately, we conclude that Kindler is entitled to the habeas relief that the district court ordered, and we will affirm.

I. Factual and Procedural Background

A. The Crime.

In 1982, Joseph Kindler, Scott Shaw, and David Bernstein burglarized a store in Lower Moreland Township, Pennsylvania. Police stopped their "getaway" car as they sped from the scene, and took Shaw and Bernstein into custody. Somehow, Kindler managed to escape. However, under police questioning, Bernstein identified Kindler as the driver of the getaway car and the mastermind behind the burglary. Bernstein also offered to testify against both Kindler and Shaw. Armed with this information, police obtained a warrant and arrested Kindler. The warrant identified Bernstein as the informant, and Kindler subsquently learned that Bernstein had been granted immunity so he could testify against Kindler.

Following his arrest, and subsequent release on bail, Kindler, along with Shaw and Shaw's girlfriend, Michelle Raifer, devised a plan to kill Bernstein in order to silence him. Pursuant to that

plan, Raifer lured Bernstein to the door of his apartment in the early morning hours of July 25, 1982. Kindler, who had been lying in wait, attacked Bernstein and struck him over the head with a baseball bat approximately 20 times. Acting on Kindler's instructions, Shaw then jabbed Bernstein in the ribs with an electric prod numerous times. Kindler and Shaw then dragged an immobilized Bernstein to Raifer's waiting car, leaving a 30-foot trail of blood behind. The two threw Bernstein into the trunk of the car and then drove to the banks of the Delaware River where they took Bernstein from the trunk and threw him into the river. Miraculously, Bernstein was still alive when he was thrown into the river. Upon realizing that their blows had not killed Bernstein, Kindler and Shaw managed to fill Bernstein's lungs with water and then they tied a cinder block around his neck to weigh him down.

Kindler, Shaw, and Raifer then drove back to Kindler's home. They discarded their weapons and other physical evidence by throwing them down various sewer inlets along the way. Despite those "precautions," the plan began unraveling almost immediately because police tracked down Raifer's blood-soaked car within a few hours of the crime. Bernstein's girlfriend and others had seen it during the course of the killing. Raifer confessed after police confronted her with evidence that tied her to the assault. In her confession, she implicated Kindler and Shaw, and directed police to the

various sewer inlets where they had thrown the evidence. To further complicate matters, Bernstein's body surfaced the next day. During a subsequent examination, police established that he died from drowning and massive head injuries.

B. The Trial and Kindler's Post-Verdict Motions.

Kindler and Shaw were jointly tried for Bernstein's murder in state court, and the jury convicted both of first-degree murder and criminal conspiracy. During the ensuing penalty hearing, the jury found two aggravating circumstances pertaining to Kindler; *viz*, he killed Bernstein to prevent him from testifying, *see* 42 Pa. Cons. Stat. § 9711(d)(5), and he committed the killing while perpetrating a felony – kidnapping. *See* 42 Pa. Cons. Stat. § 9711(d)(6). Although the Commonwealth also argued that the "offense was committed by means of torture," 42 Pa. Cons. Stat. § 9711 (d)(8), the jury did not find that aggravating circumstance. The jury found no mitigating circumstances in favor of Kindler. Thus, pursuant to 42 Pa. Cons. Stat. § 9711(c)(1)(iv), Kindler was given the death penalty.[2] After the penalty hearing, but before the sentence was formally imposed, Kindler

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[2]Shaw received a sentence of life imprisonment.

filed post-verdict motions with the assistance of new counsel.[3]

On September 19, 1984, while the post-verdict motions were pending, Kindler escaped from a Philadelphia jail where he was being held. Following the escape, the Commonwealth immediately moved to dismiss his post-verdict motions because he was then a fugitive. The trial court granted that motion holding that Kindler had waived any right to have his post-verdict motions considered by escaping.

Kindler was eventually arrested on new criminal charges as well as on immigration violations in Canada However, soon after his arrest there, he once again managed to escape. This time, he used bed sheets to create a makeshift rope to escape from the thirteenth floor of the facility in Montreal where he was being held. He was captured once again in New Brunswick Canada in 1988.

Upon being returned to Philadelphia in 1991, Kindler moved to reinstate his post-verdict motions; the trial court denied the motion.

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[3]In Pennsylvania, the death sentence is received and recorded by the court after the jury determines the sentence. The court formally imposes the sentence sometime later. *See* 42 Pa. Cons. Stat. § 9711(g).

C. Kindler's Direct Appeal and State Post-Conviction Proceedings

On October 3, 1991, the trial court formally imposed Kindler's death sentence for the murder conviction, as well as a consecutive term of 10 to 20 years imprisonment for the kidnapping, and a concurrent term of five to 10 years for criminal conspiracy. Kindler appealed arguing that the trial court should have addressed the merits of his post-verdict motions upon his capture and return to Philadelphia. The Superior Court rejected the argument and upheld his conviction and sentence; the Pennsylvania Supreme Court affirmed. *See Commonwealth v. Kindler*, 639 A.2d 1 (Pa. 1994). The Pennsylvania Supreme Court ruled that the trial court had properly denied Kindler's post-verdict motions without considering the merits because of Kindler's escape. *Id.* at 3 ("[T]he action taken in dismissing the post-verdict motions was a reasonable response to [Kindler]'s 'flouting' of the authority of the court"). The Court concluded that the escape resulted in Kindler waiving all claims of error and preserving nothing for appeal. Nevertheless, given the death sentence, the court reviewed the record as required by 42 Pa. Cons. Stat. § 9711(h)(3), and found no error.[4] The Court

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[4]At the time of Kindler's direct appeal, 42 Pa. Cons. Stat. § 9711(h), titled "Review of death sentence," provided as follows:

(continued...)

therefore affirmed the conviction and sentence. On October 11, 1994, the United States Supreme Court denied *certiorari*.

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[4](...continued)

(1) A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules.
(2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for further proceedings as provided in paragraph (4).
(3) The Supreme Court shall affirm the sentence of death unless it determines that:
(i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;
(ii) the evidence fails to support the finding of at least one aggravating circumstance specified in subsection (d); or
(iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.
(4) If the Supreme Court determines that the death penalty must be vacated because none of the aggravating circumstances are supported by sufficient evidence or because the sentence of death is disproportionate to the penalty imposed in similar cases, then it shall remand for the imposition of a life imprisonment sentence. If the Supreme Court determines that the death penalty must be vacated for any other reason, it shall remand for a new sentencing hearing pursuant to subsections (a) through (g).

On January 11, 1996, Kindler filed a petition under Pennsylvania's Post-Conviction Relief Act ("PCRA") in which he asked the court to adjudicate the merits of the claims he had raised on direct appeal. The PCRA court denied the petition without a hearing because the Pennsylvania Supreme Court had already ruled that Kindler's escape resulted in a waiver of all appellate claims he may otherwise have had. The Pennsylvania Supreme Court subsequently affirmed, agreeing that Kindler was ineligible for PCRA relief. *Commonwealth v. Kindler*, 722 A.2d 143, 148 (Pa. 1998). The Court also concluded that Kindler's claims had been previously litigated because he had challenged the dismissal of his post-verdict motions on direct appeal. The Court explained: "[t]o grant [Kindler] the relief he requests in his PCRA, an evidentiary hearing on claims already forfeited by his flight from captivity, would render meaningless all previous rulings of the trial court and of this Court." *Id.* at 148. The Court rejected Kindler's argument that Pennsylvania's "relaxed waiver" doctrine permitted review of the merits of his claim. Although that doctrine allowed courts to look past a procedural default and reach the merits of claims in a capital case, the Court reasoned that the doctrine did not apply to Kindler because it was "his own act of becoming a fugitive that resulted in the forfeiture of the right to review of those claims." *Id.* at 148 n.13. The Court denied reargument on March 15, 1999.

D. Kindler's District Court Habeas Proceedings

On March 13, 2000, Kindler filed a counseled § 2254 habeas petition in the United States District Court for the Eastern District of Pennsylvania which he subsequently amended. The amended petition raised eleven grounds for relief. *See Kindler v. Horn*, 291 F. Supp. 2d 323, 337-38 (E.D. Pa. 2003) (summarizing the claims). In opposing relief, the Commonwealth claimed that the petition was untimely, and that Pennsylvania's fugitive waiver rule was an "independent and adequate" state ground precluding federal habeas relief. The Commonwealth also argued that the claims were meritless.

The district court applied statutory tolling and ruled that Kindler's petition was timely. The court concluded that Kindler's petition for reargument before the Pennsylvania Supreme Court, had tolled the period of limitations. The Supreme Court of Pennsylvania had denied that petition on March 15, 1999. The district court held that Kindler had one year from that date to file his habeas petition. Since he filed it on March 13, 2000, the district court concluded that his petition was timely. *Kindler v. Horn*, 291 F. Supp. 2d at 338-39.

Next, the district court relied in part on *Doctor v. Walters*, 96 F.3d 675 (3d Cir. 1996), in rejecting the Commonwealth's claim of procedural

default. There, we had held that Pennsylvania's fugitive forfeiture rule was not firmly established when Doctor, the habeas petitioner, escaped in 1986. Accordingly, the district court held that "the fugitive forfeiture rule . . . [did] not provide an independent and adequate basis to preclude federal review of [Kindler's] habeas claims. . . ." *Kindler v. Horn*, 291 F. Supp. 2d at 343.

In addressing the merits of Kindler's claim, the district court rejected all of Kindler's challenges to the guilt phase of his trial. However, the court agreed with Kindler's challenge to the penalty phase, and concluded that the trial court's jury instruction was inconsistent with the Supreme Court's pronouncements in *Mills v. Maryland*, 486 U.S. 367 (1988). The court also ruled that Kindler was entitled to relief because of the prosecutor's argument during the penalty phase. The court concluded that the prosecutor had improperly introduced an aggravating circumstance and had also "vouched for the death penalty with respect to [Kindler] . . . in violation of his rights under the Eighth and Fourteenth Amendments to the U.S. Constitution." *Kindler v. Horn*, 291 F. Supp. 2d at 367.

The Commonwealth appealed the order granting a new sentencing hearing (C.A. No. 03-9010), and Kindler appealed the denial of relief on his other claims. (C.A. No. 03-9011). The appeals were consolidated, and we granted a

certificate of appealability to Kindler allowing him to raise counsel's ineffectiveness at sentencing, and the district court's failure to instruct the jury that he was not eligible for parole if sentenced to life imprisonment. *Kindler v. Horn*, No. 03-9011 (order entered Oct. 21, 2004).

Before addressing the merits of either appeal, we must determine the threshold procedural issues, including whether Kindler's habeas petition was timely filed. If Kindler's claims are timely and not defaulted, we must then determine whether the district court erred in granting relief pursuant to *Mills v. Maryland*. In addition, we must determine whether the court erred in denying relief on Kindler's claim that the trial erroneously failed to instruct the jury that he was ineligible for parole, as well as Kindler's claim of ineffective assistance of counsel during the penalty phase of his trial. As mentioned above, we decline to address Kindler's prosecutorial misconduct claims.

II. Timeliness and Procedural Default

The Anti-Terrorism, and Effective Death Penalty Act ("AEDPA") creates a one-year period of limitations for state prisoners to file federal habeas petitions. *See* 28 U.S.C. § 2244(d)(1). The one year clock usually starts ticking when the time for direct review expires. Typically, that is when the United States Supreme Court denies *certiorari* or when the time for seeking *certiorari* review expires.

However, the limitation period is tolled while "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment . . . is pending." 28 U.S.C. § 2244(d)(2).

Kindler and the Commonwealth agree that the limitation period here was tolled until at least December 11, 1998 when the Pennsylvania Supreme Court rejected his appeal of the denial of PCRA relief.[5] As noted earlier, thereafter, Kindler filed for reargument of that December 11 ruling, and that petition for reargument was not decided until March 15, 1999. The parties disagree about whether the filing period was tolled while his petition for reargument was pending before the Pennsylvania Supreme Court. If the period was not tolled by filing the petition for reargument, Kindler's one year limitation period expired on December 10, 2000, and his March 13, 2000 federal habeas petition would therefore be untimely.

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[5]Kindler's PCRA petition was pending as of April 24, 1996, when AEDPA became effective, and remained pending at least through December 11, 1998 when the Pennsylvania Supreme Court denied Kindler's state habeas petition. *See* 28 U.S.C. § 2244(d)(2); *see also, Burns v. Morton*, 134 F.3d 109, 111 (3d Cir. 1998); *Miller v. N.J. State Dep't of Corrs.*, 145 F.3d 616, 617 (3d Cir. 1998) (holding that for convictions that became final prior to AEDPA's enactment, the AEDPA limitations period begins on AEDPA's effective date of April 23, 1996).

Conversely, if the AEDPA clock was tolled while that petition was pending, the habeas petition was timely filed as detailed above.[6]

Congress specifically provided that the one year period for filing a federal habeas petition is tolled while "a properly filed application for state post-conviction review or other collateral proceeding is pending." 28 U.S.C. § 2244(d)(2). AEDPA does not specifically define that phrase or explain what it includes. Nevertheless, we have held that an application for relief that is permitted under state law and filed in accordance with the state's procedural requirements, tolls the filing period under AEDPA. *Compare Lovasz v. Vaughn*, 134 F.3d 146 (3d Cir. 1998) (a prisoner's second state habeas petition tolled the AEDPA period of limitations because the state courts permitted successive habeas petitions, and occasionally granted relief on these petitions.); *with Douglas v. Horn*, 359 F.3d 257 (3d Cir. 2004) (a notice to appeal *nunc pro tunc*

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[6]We reject the Commonwealth's argument that the limitation period was not tolled from December 11, when the PCRA petition was denied to December 20th when the motion for reargument was filed because there was nothing pending before a court during that time. *See Carey v. Saffold*, 536 U.S. 214 (2002) (petitioner's application would be considered as pending during 4 1/2 month time between denial of lower court petition and filing of appeal of that decision so long as the appeal was filed in accordance to state law.)

did not toll the limitation period because Pennsylvania courts do not recognize *nunc pro tunc* appeals as a permissible avenue for post-conviction relief.).

The Commonwealth does not dispute that Kindler properly filed his motion for reargument within 14 days of the denial of relief, as required by state law. Rather, the Commonwealth argues that motions for reargument are petitions for "extraordinary relief," and therefore not encompassed within the meaning of "a properly filed petition" under AEDPA. The Commonwealth rests this argument on its contention that such petitions are "not favored" under Pennsylvania law. According to the Commonwealth such petitions are an exceptional form of relief and Congress could therefore not have intended the AEDPA clock to stop ticking while such a motion was pending.

However, we have found no Pennsylvania statute, case or rule prohibiting motions for reargument and the Commonwealth does not direct us to any. Indeed, Pennsylvania appellate practice specifically provides for a motion for reargument, and sets forth the time for filing such a motion. *See* Pa.R.A.P. 2542 (setting forth a 14 day time limit for filing a motion for reargument as well as other procedures for such motions); *see also* Pa.R.A.P. 2543-2547. Moreover, not surprisingly, capital defendants in Pennsylvania routinely seek reargument when their claims for relief are denied, and the Pennsylvania Supreme Court has granted such

motions on more than one occasion. *See Commonwealth v. Saranchak*, 810 A.2d 1197 (Pa. 2002) (on reargument, granting reinstatement of PCRA petition that had been dismissed on appeal); *Commonwealth v. Young*, 748 A.2d 166 (Pa. 2000) (on reargument, granting relief on claim that was denied in original decision); *see also, Lovasz v Vaughn*, 134 F.3d 146 (3d Cir. 1998) (considering the fact that the state historically allowed a certain type of filing in determining that such a filing tolls the AEDPA statute of limitations).

The Commonwealth nevertheless claims that Kindler's motion for reargument should not toll the limitation period here because it was not necessary to exhaust state remedies. According to the Commonwealth, only proceedings that are required to exhaust a claim toll the limitation period under AEDPA. That argument is not rooted in the text of AEDPA or any decision of this court or the Supreme Court. Rather, the Commonwealth rests this argument upon the logic of harmonizing AEDPA's requirements for exhaustion and tolling. The Commonwealth also argues that this interpretation of AEDPA's one year time limit prevents habeas petitioners from tolling the limitation period indefinitely with a series of "exotic" petitions for "extraordinary" relief. We disagree.

Nothing in the text of AEDPA suggests that Congress intended any such linkage. To the con-

trary, that text undermines the Commonwealth's attempt to read exhaustion into the statute's tolling requirements. Section 2244 conditions AEDPA tolling only upon properly filing an application for post-conviction or collateral review. Once properly filed, the time during which the petition is pending is explicitly tolled under § 2244. Congress could easily have declared that the limitations period would only be tolled while any petition required to exhaust claims is pending in state court. It did not do so, and we cannot amend the statute by adopting the Commonwealth's attempt to forge a nonexistent link between exhaustion and statutory tolling.[7]

Moreover, we rejected a similar argument in *Sweger v. Chesney*, 294 F.3d 506 (3d Cir. 2002). There, we concluded that the plain text of 28 U.S.C. § 2244 undermines any policy justification for linking AEDPA's tolling requirements with its exhaustion requirements. Specifically, we had to determine

> whether this tolling provision applies on a claim-by-claim basis, requiring at least one or more of the issues raised in the state collateral proceeding to be

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[7]Indeed, it is ironic given considerations of deference and comity so frequently relied upon in arguing against federal relief that the state would now ask us to ignore a procedure provided under state procedural law and utilized by the state's highest court.

> included in the federal habeas petition, or whether a state post-conviction proceeding attacking a judgment of conviction tolls the period of limitations for the entire habeas petition attacking that same judgment.

294 F.3d at 513.

We held that Congress did not intend AEDPA's tolling provision to be applied on a case by case basis. We noted that our decision would have been the same even if we factored policy considerations into our analysis because separate rules for tolling and exhaustion advance, rather than retard, the goals of federalism and comity enshrined in AEDPA. *Id.* at 519-520 ("the statute of limitations . . . and the exhaustion doctrine . . . impose entirely distinct requirements on habeas petitioners; [although] both must be satisfied before a federal court may consider the merits of a petition."). Maintaining the distinction encourages habeas petitioners to utilize all avenues for review authorized under state law before seeking habeas relief in federal court. *Id.*

Moreover, we are simply not impressed by the Commonwealth's concern that habeas petitioners may endlessly extend AEDPA's one year filing deadline by resorting to exotic or "extraordinary" state petitions. That theoretical concern, not exemplified here, does not justify the forced reading

of AEDPA required by the Commonwealth's position.

B. Procedural Default

As noted above, the Pennsylvania courts applied Pennsylvania's fugitive forfeiture rule and concluded that Kindler waived his right to seek appellate review. They thus dismissed his appeals without reaching the merits of any of his claims. As a matter of comity and federalism, a federal court cannot rule on the merits of a habeas petitioner's claims when a state court has found such claims to be procedurally defaulted pursuant to an independent and adequate state procedural rule unless the petitioner shows cause and prejudice for the default. *See Doctor v. Walters*, 96 F.3d 675, 683 (3d Cir. 1996). The district court reasoned that, in this case, Pennsylvania's fugitive forfeiture doctrine did not preclude review of the merits of Kindler's claims. We agree.

A state procedural rule precludes federal habeas review only if it is "firmly established" and "consistently and regularly applied" by the state's courts. *See Johnson v. Mississippi*, 486 U.S. 578, 587 (1988); *see also Ford v. Georgia*, 498 U.S. 411, 423-24 (1991) (state procedural rule must be "firmly established and regularly followed" to bar federal habeas review). In addition, the state rule must speak in unmistakable terms, and the state courts' refusal to review a petitioner's claim must be

consistent with decisions in similar cases. *See Doctor v. Walters*, 96 F.3d at 683-684; *Neely v. Zimmerman*, 858 F.2d 144, 148 (3d Cir. 1988). A procedural rule that is consistently applied in the vast majority of cases is adequate to bar federal habeas review even if state courts are willing to occasionally overlook it and review the merits of a claim for relief where the rule would otherwise apply. *Id.* Furthermore, the adequacy of the rule is determined by the law in effect at the time of the asserted waiver, not when the petitioner subsequently seeks review in federal court. *See Doctor*, 96 F.3d at 684.

Despite the Commonwealth's efforts to distinguish this case, our analysis of Kindler's procedural default is controlled by our analysis in *Doctor*. There, we held that Pennsylvania's fugitive forfeiture rule did not bar federal habeas review as applied to Doctor, a habeas petitioner who had, like Kindler, escaped. Doctor escaped in 1986 during a lunch recess of his criminal trial, but the trial resumed after the recess and he was convicted *in absentia*. *Id.* at 678. Five years later, after he was captured and sentenced, he appealed. The Pennsylvania courts applied the fugitive forfeiture rule and refused to consider the merits of his appeal. *Id.* On federal habeas review, the Commonwealth argued that the state courts' application of the fugitive waiver doctrine precluded federal habeas relief. We disagreed because the rule was not being consistently or strictly applied when Doctor escaped in

1986. *Id.* at 684-686. After surveying decisions of Pennsylvania courts we concluded that Pennsylvania courts had discretion to hear an appeal filed by a fugitive who had been returned to custody before an appeal was initiated or dismissed. *Id.* at 686. Accordingly, the fugitive forfeiture rule was not "firmly established" and therefore was not an independent and adequate procedural rule sufficient to bar review of the merits of a habeas petitioner in federal court.

Here, Kindler escaped from custody in 1984 while his post-verdict motions were pending. Kindler, like Doctor, was returned to custody before any direct appeal of his conviction or sentence was initiated. The Commonwealth seeks to distinguish *Doctor* because Kindler's escape resulted in the dismissal of post-verdict motions that were pending when he escaped. The Commonwealth contends that the dismissed post-verdict motions were analogous to a dismissed appeal. Therefore, argues the Commonwealth, the state appellate courts had no more discretion to re-instate Kindler's post-verdict motions than they had to reinstate a dismissed appeal. Despite its facial appeal, we cannot agree with this interpretation of *Doctor*.

In *Commonwealth v. Galloway*, 333 A.2d 741 (Pa. 1975), as discussed in *Doctor*, the Pennsylvania Supreme Court re-instated supplemental post-verdict motions that had been dismissed pursuant to the fugitive forfeiture rule. The court did so

because once the defendant was apprehended, he was returned to the jurisdiction of the court, and would therefore be responsible for, and subject to, the court's judgment. *Galloway* thus underscores a critical distinction between dismissed post-verdict motions and a dismissed final appeal. That distinction arises from the fact that after an appeal is dismissed, a court no longer retains jurisdiction. However, appellate courts can exercise jurisdiction after post-verdict motions are dismissed, and they therefore can exercise discretion to hear the claims of defendant's appeal. Thus, *Galloway* fatally undercuts the Commonwealth's attempt to distinguish Kindler's situation from Doctor's based upon differences in the procedural posture at the time of their respective escapes. When Kindler escaped in 1984, Galloway had not been overruled. Accordingly, the state trial court still had discretion to reinstate his post-verdict motions. Accordingly, we conclude that, under *Doctor*, Pennsylvania's fugitive waiver law did not preclude the district court from reviewing the merits of the claims raised in Kindler's habeas petition.

III. Kindler's Claims.

We review the district court's resolution of Kindler's claims *de novo*. *See Duncan v. Morton*, 256 F.3d 189, 196 (3d Cir. 2001). We do not apply the deferential standard of review otherwise applicable under AEDPA because Kindler's claims have never been "adjudicated on the merits" in state

courts. *See Bronshtein v. Horn*, 404 F.3d 700, 710 (3d Cir. 2005).

A. Mills v. Maryland

Kindler contends that his sentence was imposed in violation of the Eighth Amendment, as construed in *Mills v. Maryland* and *Boyde v. California*, 494 U.S.370 (1990). More specifically, Kindler contends that the jury instructions and verdict slip created a reasonable likelihood that the jury believed it could only consider mitigating circumstances that jurors unanimously agreed upon. The district court agreed and granted a conditional writ requiring the Commonwealth to either conduct a new sentencing hearing or cause Kindler to be sentenced to life imprisonment.

In *Mills v. Maryland*, the Supreme Court held that the Constitution prohibits a state from requiring jurors to unanimously agree upon the existence of a particular mitigating circumstance before weighing that circumstance against any aggravating circumstances during the penalty phase of a capital trial. The Court illustrated with a "disturbing scenario" wherein eleven jurors agreed upon a mitigating circumstance but concluded that they could not consider it because a 12th juror disagreed that it exists. *Mills*, 486 U.S. at 373. That single juror's view of the facts would result in the death penalty being imposed despite the will of the overwhelming majority of the jurors.

Equally disturbing to the Court was the possibility that all twelve jurors would each find a mitigating circumstance, but not be able to agree on the existence of any one "mitigator." Such a jury would also recommend a sentence of death because it would erroneously conclude that there was nothing to weigh against the aggravating circumstances that may exist. *Id.* The Court thus concluded that the Eighth Amendment requires that jurors be allowed to consider any and all mitigating circumstances without the requirement of unanimity. *Id.* at 384. Accordingly, a death sentence must be vacated if there is a substantial probability that the jury charge caused a reasonable juror to believe that mitigating circumstances cannot be considered unless all jurors agree on the existence of the mitigating circumstance. *Id.*

The Supreme Court later clarified *Mills* in *Boyde v. California.* In *Boyde*, the Court explained that the inquiry under *Mills* was whether "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration" of relevant mitigating circumstances that the defendant proffered.

Here, the court's instruction at the beginning of the penalty phase included the following explanation:[8]

> Now, the aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt. Mitigating circumstances must be proved by the defendant by a preponderance of the evidence. A preponderance of the evidence is somewhat less proof than is required for reasonable doubt.
>
> Now, the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in that list, subsection "D" and no mitigating circumstances or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances.
>
> The verdict must be a sentence of life imprisonment in all other cases. The court may in its discretion discharge the jury if it is of the opinion that further deliberation will not result in a

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[8]Kindler's counsel objected to this charge on the record. Joint Appendix ("JA"), 204-205.

> unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment. The court shall instruct the jury on any other matters that may be just and proper under the circumstances. . . .

JA 73-74 & 196-97.[9]

> Moreover, the verdict slip read:
>
> We, the jury empaneled in the above entitled case, having heretofore determined that the defendant is guilty of murder in the first degree, do hereby find:

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[9]The second time that the judge read the instructions, he removed the words "in that list" and added a filler phrase; "which you have seen," so that the instructions read:

> Now, the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified subsection "D," which you have seen and no mitigating circumstances or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances.

JA 197.

AGGRAVATING CIRCUMSTANCE(S)

The victim was a fireman, peace officer, or public servant concerned in official detention who was killed in the performance of his duties ( )

The defendant paid or was paid by another person or had contracted to pay or be paid by another person or has conspired to pay or be paid by another person for the killing of the victim ( )

The victim was being held by the defendant for ransom or reward, or as a shield or hostage ( )

The death of the victim occurred while defendant was engaged in the hijacking of an aircraft ( )

The victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses ( )

The defendant committed a killing while in the perpetration of a felony ( )

In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense ( )

The offense was committed by means of torture ( )

The defendant has a significant history of felony convictions involving the use or threat of violence to the person ( )

The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense ( )

MITIGATING CIRCUMSTANCE(S)

The defendant has no significant history of prior criminal convictions ( )

The defendant was under the influence of extreme mental or emotional disturbance ( )

The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired ( )

The age of the defendant at the time of the crime ( )

The defendant acted under extreme duress, although not such duress as to constitute a defense to prosecution under Section 309 (relating to duress), or acted under the substantial domination of another person ( )

The victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts ( )

The defendant's participation in the homicidal act was relatively minor ( )

Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense ( )

The aggravating circumstance(s) outweigh the mitigating circumstance(s) YES ( ) NO ( )

> We the jury render the following sentencing verdict:
>
> DEATH ( )
>
> LIFE IMPRISONMENT ( )

JA 213-15.

In addition, the following exchange occurred between the court and the jury foreperson when the jury returned to ask a question during deliberations:

> JURY FOREPERSON: Do we have to apply any checkmarks besides the aggravating and mitigating circumstances on the final sheet? What I'm saying, is that there's a poll taken and say were using all 10 questions, you know, just for example, and there's quite a possibility that all 12 people would pick all 10. Do you want a checkmark or do you want a number beside those?
>
> THE COURT: I'll just read the instructions from the law and then I'll answer your question. The verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance that's specified in

> subsection D and no mitigating circumstances or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.
>
> In other words, the only ones that you would mark off and report would be [the ones] that all of you had agreed upon. Are there any further questions?
>
> JURY FOREPERSON: You don't want a number there; you just want a checkmark.
>
> THE COURT: A checkmark.

JA 198-200.

The judge's answers thus exacerbated the *Mills* problem that already infected the jury's deliberations based upon the misleading and ambiguous wording of the jury charge. That charge clearly created a reasonable likelihood that the jurors may have believed that they could only consider the mitigating circumstances that they unanimously agreed upon. The language quoted above instructed the jury that: *"the verdict must be a sentence of death if the jury unanimously finds at*

least one aggravating circumstance . . . and no mitigating circumstances or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances." Thus, "unanimous" modifies "finds" and creates a reasonable likelihood that the jurors erroneously believed that mitigating and aggravating circumstances both had to be unanimously agreed upon. Nowhere were the jurors told that they only had to unanimously agree on aggravating circumstances and not mitigating circumstances, or that the requirement of unanimity did not apply to any mitigating circumstance that any juror may have found by a preponderance of the evidence.

This conclusion is consistent with our recent holding in *Abu-Jamal v. Horn*, 520 F.3d 272 (3d Cir. 2008), as well as other cases where similar instructions were given.[10] *See Albrecht v. Horn*, 471 F.3d 435 (finding a *Mills* violation, but vacating the district court's order granting habeas relief after applying *Teague v. Lane*); *Banks v. Horn*, 271 F.3d 527 (3d Cir. 2001), rev'd on other grounds by *Beard*

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[10]In *Abu-Jamal*, we rejected the Commonwealth's contention that our decision upholding the charge in *Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3d Cir. 1991) precluded a *Mills* violation in that case. *See Zettlemoyer*, 923 F.2d at 308 (upholding charge instructing the jury to impose death if they unanimously agree and find that the aggravating circumstances outweigh the mitigating circumstances.).

v. Banks, 542 U.S. 406 (2004); *Frey v. Fulcomer*, 132 F.3d 916, 923-24 (3d Cir. 1997).

In addition, as we have just explained, the confusion was amplified by the court's exchange with the jury foreperson when the jury returned to ask a question during deliberations.

Finally, the error was further exacerbated by the wording of the verdict slip. Unlike *Hackett v. Price*, 381 F.3d 281 (3d. Cir. 2004), where the verdict slip established that the jury agreed that there were no mitigating circumstances, the verdict slip here offered no direction regarding how findings were to be made. Moreover, no boxes were checked. This may mean that no juror found any mitigating circumstance as the Commonwealth argues. However, it is equally likely that jurors could not unanimously agree on any particular mitigating circumstance even though one or more juror was convinced a mitigating circumstance had been established, and that the jury assumed that the mitigating circumstance could not be weighed because of the lack of unanimity. Accordingly, the district court properly granted relief under *Mills*.

B. Ineffective Assistance of Counsel[11]

Kindler also contends that his attorney's performance during the penalty phase deprived him of effective assistance of counsel under the Sixth Amendment because his attorney failed to investigate his social and family history or his mental health history.

Ineffective assistance of counsel claims are governed by the familiar two-prong inquiry set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), requiring a petitioner to show that counsel's performance was deficient and that the deficiency prejudiced him. The first prong is established by demonstrating that counsel's performance fell below an objective standard of reasonableness. *Id.* The reasonableness of counsel's performance is assessed on the facts of the particular case at the time of the challenged conduct or omission. *Id.* at 689. The prejudice inquiry requires a showing that "there is a reasonable

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[11]Although our conclusion that the district court did not err in granting relief under *Mills* is itself sufficient to affirm the conditional writ that the district court granted and decide Kindler's appeal, we think it important to also discuss Kindler's claim of ineffective assistance of counsel during the penalty phase because of the importance of the issue to our jurisprudence, the gravity of the consequence of the alleged deficiency, and the need to provide guidance in future cases.

probability that, but for counsel's errors, the result of the proceeding would have been different." *Id.* at 694. A "reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Kindler submitted an affidavit from Daniel-Paul Alva, his trial counsel, in support of his *Strickland* claim. That affidavit includes the following declaration:

> Mr. Kindler's case was my first capital trial. I did not have any experience or training in how to handle capital cases, in particular the penalty phase of the proceeding.
>
> I concentrated my efforts on attempting to create a reasonable doubt as to Mr. Kindler's guilt, although I was aware that there was a strong likelihood that Mr. Kindler would be convicted.
>
> I did not conduct a penalty phase or mitigation investigation. In particular, I did not talk to Mr. Kindler or any of his family members about his family background. Mr. Kindler's family was available to me. His parents had retained me, and they attended the trial. I simply did not think about

> investigating or presenting evidence concerning family background at the penalty phase.
>
> I also did not attempt to obtain any school, medical or other records relating to Mr. Kindler. I did not have a strategic or tactical reason for not seeking such records; it just did not occur to me that such records could be helpful.
>
> I also did not consider obtaining any mental health evaluation of Mr. Kindler. Again, there was no strategic or tactical reason for my failure to do so.

S.A. 25.

Kindler also submitted declarations from his parents, his sister, a friend, a psychologist and a psychiatrist detailing information that Kindler claims would have been uncovered by an adequate investigation. Kindler's parents and sister detailed Kindler's upbringing. Kindler's parents fought frequently and violently. In these fights, his parents threw household items, dishes, shoes, and furniture at each other. Kindler personally witnessed these fights, and they left him terrified and crying. Kindler's mother was violent, depressed, and often intoxicated. She attempted suicide on several occasions. Kindler's father was so controlling that

he even restricted the amount of water, electricity, and other resources available to Kindler and his sister. After Kindler's mother separated from his father, Kindler's father threatened to kill her and the children. Supp. App. 7. Kindler's sister described the situation as "living with two crazy people that could not control themselves." Supp. App. 12.

The declarations also state that both of Kindler's parents abused him. His mother was verbally abusive. *Id.* She also threw food at Kindler, and once dumped soup on his head when he wouldn't eat. Kindler's father physically abused him with electrical cords. These beatings would leave him with welts on his back, and blood showing through his shirt. After his mother and father separated, Kindler lived with his father, and they fought frequently. Their relationship deteriorated to the point where Kindler's sister described an instance where Kindler and his father threw bricks at each other during a fight. Kindler's friend described a motorcycle accident Kindler was involved in when Kindler was a "preteen." Supp. App. 16. The motorcycle Kindler was riding on was hit by a car causing Kindler to lose consciousness for a few minutes. After regaining consciousness, Kindler was dazed and confused, and could not remember the accident. His speech was also incomprehensible. Despite those symptoms, Kindler was not taken to a hospital or given medical treatment.

Perhaps most importantly, in her affidavit, psychologist, Carol Armstrong, Ph.D., declared that Kindler suffered from frontal lobe impairment that can affect judgment, and the ability to control impulsive behavior. The frontal lobe impairment is consistent with Kindler's history of head injuries, and physical and emotional abuse. She also attested to the cognitive, developmental, and emotional effects that the neglect, abuse, and violence that surrounded Kindler could have had upon him. Armstrong additionally noted that the tests she performed could have been performed and would have resulted in the same conclusions at the time of Kindler's penalty phase proceedings.

As if this were not sufficiently derelict, psychiatrist, Robert A. Fox, declared that he also evaluated Kindler and reviewed various records. Fox diagnosed Kindler as suffering from "mood disorder due to a general medical condition with mixed features" and "narcissistic personality disorder" at the time of the crimes. Supp. App. 23. He stated that the mood disorder caused periods of hypomanic symptoms interspersed with periods of depression and significant distress and impairment in Kindler's life. According to Dr. Fox, similar distress resulted from the narcissistic personality disorder, which is characterized by grandiosity, a need for admiration, and a lack of empathy. Fox concluded that these two disorders, in combination with the history of physical and emotional trauma,

were impairments that constituted an extreme mental or emotional disturbance.

The district court concluded that Alva's performance did not violate Kindler's Sixth Amendment right to effective assistance of counsel. The court reasoned that although Alva's failure to investigate Kinder's personal and psychological history constituted deficient performance under the first *Strickland* prong, that failure did not prejudice Kindler, and he therefore could not prevail under the second prong. The district court believed that this evidence could have been viewed as a mitigating circumstance, but the court did "not believe that the jury could have determined that this mitigating factor adequately outweighed the two aggravating factors found." *Id.*

Both parties assert that the district court erred. The Commonwealth argues that the court erred in ruling that Alva's performance was deficient; Kindler argues that the district court erred by holding that the deficient performance did not result in prejudice.

It is difficult to understand how the Commonwealth can sincerely argue that the kind of information set forth above could not have been viewed as a mitigating circumstance by the jury or how Alva's failure to investigate it could be viewed as anything other than deficient representation. Defense counsel in capital cases has a duty to

reasonably investigate the existence of mitigating evidence unless reasonable strategic judgments support a decision not to. *See Strickland*, 466 U.S. at 691. Here, Alva admits that his failure to investigate Kindler's history was not the result of any strategic or tactical decision. Supp. App. 25. Rather, it resulted solely from his lack of experience in capital cases, and the fact that it never occurred to him to investigate Kinder's history. *Id.* Although the Commonwealth insists that Alva is "falling on his sword" for a former client, nothing on this record contradicts the veracity of his sworn affidavit, and the district court did not rest its decision on any doubt about the veracity of Alva's sworn declarations.

The Commonwealth also argues that Kindler's *Strickland* claim is belied by the quality of the mitigation case that Alva presented during the penalty phase of Kindler's trial. The Commonwealth points to the five witnesses that Alva called on Kindler's behalf and the testimony he elicited regarding Kindler's usefulness to society. The Commonwealth also points to Alva's impassioned final argument asking the jury to spare Kindler's life. This misses the point. We do not suggest that Alva's performance was deficient because he inadequately presented the limited information that he had. Rather, Alva's performance was deficient because his failure to adequately investigate mitigation evidence of mitigation materially limited what evidence he could present to the jury. Indeed,

the skillful manner in which Alva presented the limited evidence that he did have illustrates the potential force of the mitigation evidence that he did not have because he so limited the scope of his mitigation investigation.

Alva, a very skillful and forceful advocate, only presented testimony that Kindler was skilled in electronics, and could be productive in prison. That mitigation pales in comparison to the mitigating circumstances that a proper investigation of Kindler's background would have developed. In finding that Alva's performance did not prejudice Kindler, the district court considered only the evidence proffered by the two experts relating to Kindler's frontal lobe impairment and his personality and mood disorders. *Kindler v. Horn*, 291 F. Supp. 2d at 356. The court found that the mitigating circumstance of Kindler's emotional disturbance would have been established by the experts, but (in what it termed "a close call") the court held that the evidence was 'insufficient to undermine confidence in the outcome of the sentencing verdict." *Id.* We disagree; this evidence, in conjunction with proposed testimony regarding Kindler's chaotic and violent childhood with "two crazy people" for parents who constantly abused him (and each other in his presence), is sufficient to meet the second prong of the *Strickland* inquiry. *See Rompilla v. Beard*, 545 U.S. 374 (2005) (defendant was victim of physical abuse and neglect from alcoholic parents); *Wiggins v. Smith*, 539 U.S. 510 (2003) (defendant

suffered extreme parental neglect, severely abused by his mother, and sexually abused as a child); *Williams v. Taylor*, 529 U.S. 362 (2000) (defendant was severely neglected as a child); *Outten v. Kearney*, 464 F.3d 401 (3d Cir. 2006) (defendant was physically abused by father, and sexually abused by others).

Kindler's jury could easily have considered evidence of his chaotic and abusive childhood as "evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." 42 Pa. Cons. Stat. § 9711(e)(8). We cannot say with confidence that the penalty phase would have had the same result if the jurors had been able to weigh the two aggravating circumstances that were established beyond a reasonable doubt against the evidence of mitigation that a proper investigation would have presented. The evidence might well have been accepted as explaining (though certainly not excusing) Kindler's impulsive actions including why he was so willing to kill and brutalize Bernstein.

Accordingly, we find that Kindler is also entitled to a new penalty hearing because his counsel's deficient performance during the penalty phase deprived him of the effective assistance of counsel that the Sixth Amendment requires.

C. Vouching

Kindler claimed that the prosecutor's argument during the penalty phase violated his constitutional rights by improperly vouching for the death penalty. He challenged the following part of the prosecutor's statement:

> Let me at this point, ladies and gentlemen, tell you the position, the position of the office, the position of the Commonwealth.
>
> We in this case seek and urge through the evidence and the law the death penalty against Joseph Kindler.
>
> In reference to Scott Shaw, I will argue and present both of the sides and it is up to you to decide against both of these particular individuals what penalty you feel appropriate. That would be the case no matter what our office's position is but I felt from the outset here that I would let you know that the urging would be done based on the evidence would be against Mister Kindler.
>
> That does not mean that you cannot or would not, based on the evidence and the law return such a penalty if you felt appropriate, against Mister Scott

> Shaw. That is your power and if you find it your duty in connection with what the law is, then I am sure you would do it but I, at least, wanted to let you know that now.

Kindler argued that this was tantamount to improperly vouching for a sentence of death for him because the prosecutor improperly informed the jury that the official position of the District Attorney's Office was that he should be put to death, but the District Attorney did not care about whether his co-defendant should be executed. The district court agreed, and the Commonwealth appeals that ruling.

The district court reasoned:

> In considering [the prosecutor's argument], we find it clearly constituted improper vouching and harmful, constitutional error. Indeed, the entire premise of the prosecutor's argument was that the Commonwealth possessed even stronger evidence of Joseph Kindler's guilt and statutory aggravators than that presented to the jury and that 'was why the urging would be done based on the evidence . . . against Mister Kindler.'

We disagree. "Our case law indicates that to find vouching, two criteria must be met: (1) the prosecutor must assure the jury that the testimony of a Government witness is credible; and (2) this assurance is based on either the prosecutor's personal knowledge, or other information not contained in the record." *United States v. Walker*, 155 F.3d 180, 187 (3d Cir. 1998). The prosecutor's statements here do not meet either requirement.[12] The prosecutor did not draw upon evidence outside of the record to assure the jury of the credibility of a prosecution witness or the strength of the Commonwealth's case. Rather, the prosecutor emphasized that the jury's decision must be based on the law and the evidence. Although he informed jurors that he was specifically requesting the death penalty for Kindler and not Shaw, he also stated that the jury must make its own decision about what sentence was appropriate for Kindler and his codefendant irrespective of the Commonwealth's position.

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[12]We do not suggest that a defendant can never establish improper prosecutorial vouching if the challenged statement does not rigidly adhere to these criteria as there may be situations where the prosecutor's argument so strongly invokes the authority of his/her office and so blatantly crosses the line of propriety that it is tantamount to unconstitutional vouching. *See United States v. Johnson*, 968 F.2d 768 (8th Cir. 1992). However, no such circumstance is present here, and our analysis therefore proceeds along the familiar two prong inquiry discussed in *Walker*.

Although it would have been far better for the prosecutor to simply make his argument without informing the jury of the official position of the District Attorney, his statements here are distinguishable from those that have required relief in other cases. For example, in *Shurn v. Delo*, 177 F.3d 662 (8th Cir. 1999), the prosecutor, after linking the defendant to notorious mass murderer Charles Manson, and imploring the jury to kill the defendant several times, stated: "I'm the top law enforcement officer in this county and I'm the one that decides in which cases to ask for the death penalty. . . . I'm telling you there's no case that could be more obvious than the [defendants']." 177 F.3d at 666.

Although we disagree with the District Court's view of Kindler's vouching claim, we agree it comes perilously close to the evils enunciated in *Brooks v. Kemp*, 762 F.2d 1383 (11th Cir. 1985). There, the prosecutor made an unsupported claim that he had only sought the death penalty in a few cases during the past year, which improperly implied "that the prosecutor's office had already made the careful judgment that [that] case, above most other murder cases, warranted the death penalty." *Id.* at 1383. The prosecutor's statement here did not purport to draw upon evidence outside the record in order to distinguish between Kindler and his codefendant. *Cf. Giglio v. United States*, 405 U.S. 150, 154 (1972).

D. Non-Statutory Aggravating Factors

Kindler also objected to the following portion of the prosecutor's argument during the penalty phase:

> There has been testimony that you heard that Mister Shaw was in fact led. You have heard testimony from his grandmother, as a matter of fact, that he in fact got into trouble because he was led as a result of other people, because of the failure perhaps at times to have sufficient male companionship among other things. If that were the case and you must accept that does not lessen in terms of guilt of a crime indeed not as you had found.
>
> But as you must consider in reverse what and where that puts the individual that organized and effectuated this particular act, for . . . that man has not only forever ruined the life of an individual so that he is dead but ruined the life of another individual because of his influence, intensity, clarity of purpose and methods in detail. . . That is what we are talking about.
>
> If you believed that Mister Shaw was in fact led, if you believe that he, as a,

at the time, 16 year old boy, who was under the influence of older people and if you believe that either indirectly or whatever, there was a certain amount of coercion, although not sufficient to negate the crime, if you would accept that, well yes, you could find of course mitigating circumstances in that. So you must consider, however, ever there the aggravating circumstances that I had mentioned. That's up to you to decide.

But in reference to Mister Kindler, it's an entirely different story. Because with that, we are talking about, a leader, the actor, the one with the idea, the one with the motive, the one with the push throughout, the one that came back and said he's not dead yet; I had to use a concrete stone to drop him in the river. Ladies and gentlemen, that alone. We are talking about weighing, we are talking weighing of circumstances to see where the aggravating circumstances and the mitigating would apply, how they in fact would be in reference to weighing each other.

The district court concluded that this argument was tantamount to asking the jury to impose

the death penalty based upon a "non-statutory" aggravating circumstance; that Kindler was the leader who had organized the murder and in doing so exerted undue influence over a vulnerable co-defendant. The Commonwealth appeals.

We agree that the prosecutor's argument was improper. Neither Kindler's role in the murder, nor his influence over Shaw can properly be considered an aggravating circumstance under the applicable statute. See 42 Pa. Cons. Stat. § 9711(d). Rather than limit his argument to the aggravating factors defined by the legislature, the prosecutor invited the jury to impose the death penalty based upon his own view of the importance of Kindler's role and manipulation of Shaw. The prosecutor's argument introduced an invalid sentencing factor into the analysis, which is an error of constitutional magnitude. *Cf. Brown v. Sanders*, 546 U.S. 212, 220 (2006).

That said, this error did not have any "substantial and injurious effect" on the deliberations. *Fry v. Pliler*, 127 S.Ct. 2321, 2328 (2007). At Kindler's sentencing, the jury found two aggravating factors unrelated to the prosecutor's improper argument, and no mitigating factors.[13] The jury

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[13]We assume for this inquiry that the jury's findings were not affected by the *Mills* error or the ineffective assistance of counsel.

was instructed that "the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstances." We presume that the jury followed these instructions, and therefore we must conclude that the jury would have sentenced Kindler to death whether or not the improper argument was presented. *Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (stating the "almost invariable assumption of the law that jurors follow their instructions."). The result of the equation would be the same whether the jury weighed 2 aggravating circumstances against none or 3 aggravating circumstances to none. In either case, the absence of any mitigating factors would tip the balance in favor of a sentence of death. Accordingly, the admission of the improper argument was harmless.

E. Simmons v. California

Kindler also argues that the penalty phase was flawed because the trial court did not inform the jury that "life" means life in Pennsylvania and he would not be eligible for parole if sentenced to life imprisonment. In *Simmons v. South Carolina*, 512 U.S. 154 (1994), the Court held that not informing a jury that a defendant would never be released on parole if sentenced to life was a violation of due process requiring a new penalty phase. However, that requirement is only applicable when the prosecution argues future dangerousness. The Court explained:

> Holding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not. Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole. The trial court's refusal to apprise the jury of information so crucial to its sentencing determination, particularly when the prosecution alluded to the defendant's future dangerousness in its argument to the jury, cannot be reconciled with our well-established precedents interpreting the Due Process Clause.

512 U.S. 154, 164. Kindler's future dangerousness never became an issue here. Therefore, the rule in *Simmons* simply does not apply.

V. Conclusion

To summarize: we conclude that the jury instructions and verdict sheet that were used during the penalty phase of Kindler's trial denied him due process of law pursuant to the holding in *Mills v. Maryland*. We also find that Kindler was denied effective assistance of counsel during the penalty

phase. However, we find no merit in the remainder of Kindler's claims.

Accordingly, the order of the district court granting a conditional writ of habeas corpus and ordering either a new sentencing hearing within 180 days or a sentence of life imprisonment will be affirmed.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH J. KINDLER	:	CIVIL ACTION
	:	
vs.	:	
	:	
MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; DONALD T. VAUGHN, Superintendent of the State Correctional Institution at Graterford, and JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview	:	NO. 99-cv-0161

MEMORANDUM AND ORDER

JOYNER, J. **September 23, 2003**

This case has been brought before this Court by Petition of Joseph J. Kindler for Writ of Habeas Corpus. For the reasons which follow, the petition shall be partially granted and leave given to the Commonwealth to conduct a new sentencing hearing.

History of the Case

This petition seeks relief on behalf of the petitioner from the sentence of death which was formally imposed upon him on October 2, 1991. That sentence was the result of Petitioner's November 15, 1983 conviction by a Philadelphia County Court of Common Pleas jury of the first degree murder, kidnaping and criminal conspiracy to murder 22-year-old David Bernstein on July 25, 1982.

Although Petitioner filed post-verdict motions, he escaped from custody on September 19, 1984, before those motions had been decided. The Commonwealth of Pennsylvania filed a petition to dismiss the post-verdict motions because Mr. Kindler was a fugitive from justice and that petition was granted, after hearing, on the grounds that Mr. Kindler's voluntary removal of himself from the court's jurisdiction operated as a waiver of whatever rights he may have had to have his post-verdict motions considered.

Petitioner remained a fugitive until April 26, 1985 when he was arrested in Quebec, Canada on criminal and immigration charges. Extradition was requested and granted by the Canadian Minister of Justice on January 17, 1986 but Petitioner sought to have that decision reviewed in the Canadian Courts. While that review was pending, Petitioner again escaped from the prison in Montreal,

Canada where he was being held and remained at large for nearly another two years until he was again spotted and arrested in St. John, New Brunswick, following the broadcast of information about him on the television show, "America's Most Wanted." The Supreme Court of Canada thereafter affirmed the decision of the Minister of Justice on September 26, 1991 and Petitioner was finally returned to Philadelphia later that day. [Footnote 1 omitted.] As noted, Petitioner's formal sentencing took place on October 2, 1991, at which time he was sentenced to death on the murder conviction in addition to a consecutive ten to twenty years' imprisonment on the kidnaping conviction and a concurrent five to ten year sentence for criminal conspiracy. Petitioner then appealed to the Pennsylvania Supreme Court, which found: (1) that the trial court did not abuse its discretion in dismissing his post-trial motions and allegations of ineffective assistance of counsel as a response to his escape from custody and flight; (2) that sufficient evidence had been presented at trial to support the first-degree murder conviction and a finding of at least one aggravating circumstance; (3) that the death sentence was not the product of passion, prejudice or any other arbitrary factor; and (4) that the sentence was not excessive or disproportionate to those imposed in similar cases. *Commonwealth v. Kindler*, 536 Pa. 228, 639 A.2d 1 (1994). Although Mr. Kindler subsequently filed a petition for a writ of certiorari to the United States Supreme Court, that petition was likewise denied on October 11, 1994.

On January 11, 1996, Petitioner sought relief by filing a petition under the Post Conviction Relief Act, 42 Pa.C.S. §9541, *et. seq.* ("PCRA"). In that petition, Mr. Kindler raised several issues including those previously raised on direct appeal to the Pennsylvania Supreme Court as well as several claims which essentially challenged the effectiveness of both his trial and his post-trial counsel. The Philadelphia County Court of Common Pleas again found that Petitioner had waived his right to raise these arguments when he escaped and fled the jurisdiction. It therefore denied and dismissed the PCRA application without a hearing on August 15, 1996 and Petitioner appealed to the Pennsylvania Supreme Court, which subsequently affirmed the decision of the Court of Common Pleas on December 11,1998.[2]

* * * *

B. Exhaustion and/or Procedural Default of Petitioner's Claims.

Respondents next assert that the claims which Petitioner now advances are not reviewable by this Court as he failed, by escaping from custody and fleeing the Commonwealth of Pennsylvania, to give the state courts the opportunity to address and

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[2]The Supreme Court further denied Petitioner's request for reargument on March 15, 1999. *See*: *Commonwealth v. Kindler*, 554 Pa. 513, 722 A.2d 143 (1998).

possibly correct the alleged constitutional errors in his conviction and sentencing. Consequently, those claims have been procedurally defaulted. Petitioner rejoins that all of his claims have been exhausted in that they or their substantial equivalents *were* presented to the Pennsylvania state courts for adjudication and by virtue of the requirement that the Pennsylvania Supreme Court review the entire record in death penalty cases to ensure that the penalty of death was not imposed as the result of passion, prejudice or any other arbitrary factor. In addition, petitioner contends, the procedural default rules applied by the Pennsylvania state courts were not adequate to bar federal habeas merits review as of 1984, when he escaped from the Philadelphia Detention Center.

It has, of course, long been the settled rule that before a federal court may reach the merits of a claim in a timely filed §2254 petition, each claim must first have been exhausted in state court. *See*, 28 U.S.C. §2254(b)(1)(A); *Coleman v. Thompson*, 501 U.S. 722, 731-32, 111 S.Ct. 2546, 2555, 115 L.Ed.2d 640 (1991); *Baker v. Horn*, 210 F.Supp.2d 592, 625 (E.D.Pa. 2002). The exhaustion requirement ensures that state courts have the first opportunity to review federal constitutional challenges to state convictions and preserves the role of state courts in protecting federally guaranteed rights. *Caswell v. Ryan*, 953 F.2d 853, 857 (3d Cir. 1992), *cert. denied*, 504 U.S. 944, 112 S.Ct. 2283, 119

L.Ed.2d 208 (1992), citing *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982).

To satisfy the exhaustion requirement, a petitioner must demonstrate that he "fairly presented" every claim in the federal petition to each level of the state courts, including the highest state court in which the petitioner was entitled to review. *Whitney v. Horn*, 280 F.3d 240, 250 (3d Cir. 2002); *Baker*, 210 F.Supp.2d at 625, citing *O'Sullivan v. Boerckel*, 526 U.S. 838, 845-848, 119 S.Ct. 1728, 1734, 144 L.Ed.2d 1 (1999). To "fairly present" a claim, a petitioner must present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted. *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999). The state courts, however, need not reach the merits of a claim for it to be properly exhausted; exhaustion requires only that a federal habeas petitioner afford the state courts the *opportunity* to consider a claim on its merits. *Lambert v. Blackwell*, Civ. A. No. 01-CV-2511, 2003 WL 1718511 at *23 (E.D.Pa. April 1, 2003) and *Baker v. Horn*, *supra*, both citing *Castille v. Peoples*, 489 U.S. 346, 348-51, 109 S.Ct. 1056, 103 L.Ed.2d 380 (1989).

However, if a state's procedural rules bar a petitioner from seeking further relief in the state courts, the exhaustion requirement is satisfied because there is an absence of available State

corrective process.[5] *Lines v. Larkin*, 208 F.3d 153, 160 (3d Cir. 2000), citing *McCandless*, 172 F.3d at 260, 28 U.S.C. §2254(b)(1)(B)(i). This is otherwise known as "procedural default" and it is said to occur when a prisoner's federal claim is barred from consideration in the state courts by an "independent and adequate" state procedural rule. *Carpenter v. Vaughn*, 296 F.3d 138, 146 (3d Cir. 2002). Even so, this does not mean that a federal court may, without more, proceed to the merits. Instead, claims deemed exhausted because of a state procedural bar may not be considered by the federal courts unless the petitioner establishes 'cause and prejudice' or a 'fundamental miscarriage of justice' to excuse the procedural default. *Id.*

"Cause" sufficient to excuse procedural default requires a showing that some objective factor, external to the defense, prevented compliance with state procedural rules. *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986). "Actual prejudice" occurs only if an error caused the "actual and substantial disadvantage" of the petitioner. *Riley v. Myers*, Civ. A. No. 01-6958, 2002 U.S. Dist. LEXIS 24404, *20 (E.D.Pa. Dec. 18, 2002), quoting *U.S. v. Frady*, 456

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[5]Or, as sometimes occurs, it would be futile to require the presentation of the claims to the state court and hence the exhaustion requirement is excused and the claims would be subject to the doctrine of procedural default. *See, Wenger v. Frank*, 266 F.3d 218, 224 (3d Cir. 2001).

U.S. 152, 170, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1972). The burden of proof is on the petitioner to establish both cause for the default and resulting prejudice. *Id.*, citing *Teague v. Lane*, 489 U.S. 288, 298, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

Alternatively, if the petitioner establishes that the state procedural rule was not independent or adequate, the federal court may proceed to consider the merits of his claim. *See Generally*: *Gray v. Netherland*, 518 U.S. 152, 162, 116 S.Ct. 2074, 2080, 135 L.Ed.2d 457 (1996); *Harris v. Reed*, 489 U.S. 255, 262-263, 109 S.Ct. 1038, 1043, 103 L.Ed.2d 308 (1989); *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). A state rule provides an independent and adequate basis for precluding federal review of a state prisoner's habeas claims only if: (1) the state procedural rule speaks in unmistakable terms; (2) all state appellate courts refused to review the petitioner's claims on the merits; and (3) the state courts' refusal in this instance is consistent with other decisions. *Doctor v. Walters*, 96 F.3d 675, 683-684 (3d Cir. 1996); *Jones v. Lavan*, Civ. A. No. 02-2359, 2002 U.S. Dist. LEXIS 23715, *5 (E.D.Pa. Dec. 9, 2002). A state procedural ground is not "adequate" unless the procedural rule is "strictly or regularly followed." *Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S.Ct. 1981, 1987, 100 L.Ed.2d 575 (1988); *Doctor v. Walters*, supra. *See Also*: *Ford v. Georgia*, 498 U.S. 411, 423-24, 111 S.Ct. 850, 857-58, 112 L.Ed. 2d 935 (1991). Nevertheless, the Supreme

Court has held that if a state supreme court faithfully has applied a procedural rule in "the vast majority" of cases, its willingness in a few cases to overlook the rule and address a claim on the merits does not mean that it does not apply the procedural rule regularly or consistently. *Banks v. Horn*, 126 F.3d 206, 211 (3d Cir. 1997), citing *Dugger v. Adams*, 489 U.S. 401, 410, n.6, 109 S.Ct. 1211, 1217, n.6, 103 L.Ed.2d 435 (1989). Accordingly, an occasional act of grace by a state court in excusing or disregarding a state procedural rule does not render the rule inadequate to procedurally bar advancing a habeas corpus claim in a district court. *Id. See Also*: *Cabrera v. Barbo*, 175 F.3d 307, 313 (3d Cir. 1999). Federal courts should generally determine questions of procedural default according to the habeas waiver law in effect at the time of the asserted waiver. *Doctor v. Walters*, 96 F.3d at 684, citing *Reynolds v. Ellingsworth*, 843 F.2d 712, 722 (3d Cir. 1988). *See Also*: *Jermyn v. Horn*, 266 F.3d 257, 278 (3d Cir. 2001); *Banks v. Horn*, 126 F.3d at 212-213; *Peterkin v. Horn*, 176 F.Supp.2d 342, 253-354 (E.D.Pa. 2001).

In this case, the record reflects that the trial court dismissed Mr. Kindler's post-trial motions by reason of his escape from custody and his then-current status as a fugitive from justice. Although it is not absolutely clear from the record, it appears that the trial judge based this decision on the "fugitive forfeiture rule" as articulated in *Commonwealth v. Passaro*, 504 Pa. 611, 476 A.2d 346 (1984). The

Pennsylvania Supreme Court affirmed the trial court decision, concluding "that the action taken in dismissing the post-verdict motions was a reasonable response to Appellant's 'flouting' of the authority of the court . . ." *Commonwealth v. Kindler*, 536 Pa. 228, 639 A.2d 1, 3 (1994). In so holding, the Pennsylvania Supreme Court noted that it was charged with deciding whether the fugitive forfeiture rule, which was generally applicable to defendants who fled from justice during the *appellate* process, should likewise be applied to the petitioner, who fled while his *post-trial motions* were pending.

Subsequent to the Pennsylvania Supreme Court's decision affirming his conviction and sentence and the denial of his application for writ of certiorari to the U.S. Supreme Court, Mr. Kindler filed a petition under the Pennsylvania Post-Conviction Relief Act, 42 Pa.C.S. §9541, *et. seq.*, but the Philadelphia County Court of Common Pleas dismissed the petition for the same reason that it dismissed his post-verdict motions. The Pennsylvania Supreme Court affirmed this decision as well, noting that to be eligible for relief under the PCRA, the issues raised in the petition could not have been previously litigated. Reasoning that since Mr. Kindler had previously challenged the trial court's dismissal of his post-verdict motions because of his flight, the Supreme Court concluded that he could not obtain relief on this basis under the PCRA.

In considering the question of whether, as of September 20, 1984,[6] the fugitive forfeiture rule was one which the Pennsylvania courts have strictly and regularly followed and therefore whether it is independent and adequate, we are guided by the holding of the U.S. Court of Appeals for the Third Circuit in *Doctor v. Walters*, 96 F.3d 675 (3d Cir. 1996). In that case, the defendant escaped from custody during the luncheon recess of his criminal bench trial for aggravated assault and remained at large for five years. He was found guilty in absentia and, upon his return to custody, sought to appeal his conviction and sentence. The Pennsylvania Superior Court quashed the appeal pursuant to the fugitive forfeiture rule as articulated in Pa.R.A.P. 1972(6), the Pennsylvania Supreme Court affirmed and the U.S. Supreme Court denied certiorari. In evaluating whether the fugitive forfeiture rule was firmly established and regularly applied at the time that Doctor escaped in 1986, the Third Circuit conducted an exhaustive analysis of Pennsylvania Superior and Supreme Court cases applying the rule and found that as of that time,

> "Pennsylvania's fugitive forfeiture rule can be described as follows: if the defendant is returned to custody while his appeal is

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[6]This is the date on which the petitioner initially escaped from the Philadelphia Detention Center.

pending, an appellate court has the discretion to hear the appeal, but if the defendant is returned to custody after the appeal is dismissed, an appellate court lacks the discretion to reinstate and hear the appeal. . . . (citations and parenthetical references omitted). It is clear from these decisions, which reflect the state of the law at the time of petitioner's escape, that Pennsylvania law afforded appellate courts different degrees of discretion depending on the posture of the appeal upon a former fugitive's return to custody. Pennsylvania law had never confronted the situation that arises in the instant case where petitioner's flight had ended and custody had been restored before the appellate process was ever initiated. Thus, it was not "firmly established" that Pennsylvania courts lacked the discretion to hear an appeal first filed after custody had been restored. Under the *Galloway* rationale, a court would have the discretion to hear an appeal filed by such a defendant because the defendant would be in custody during the entire pendency of his appeal and subject to the enforcement of any order entered as a result thereof. Furthermore, as the Superior Court noted in *Jones*, 564 A.2d at 985-86, it was unclear, until the Pennsylvania Supreme Court's decision in *Commonwealth v. Luckenbaugh*, 520 Pa. 75, 550 A.2d 1317 (1988), whether the *Passaro* forfeiture

> analysis even applied to a defendant who escaped and returned to custody during the pendency of his appeal. Therefore, the state courts in this case did not rely on an "adequate" procedural rule to deny petitioner a review of his appeal on the merits.

Doctor, 96 F.3d at 685-686. *See Also*: *Clark v. Commonwealth of Pennsylvania*, 892 F.2d 1142, 1149 (3d Cir. 1989). Given that Mr. Kindler also escaped and was returned to custody prior to the initiation of the appellate process (albeit during the pendency of his post-trial motions), we can find no reason to depart from the analysis of the *Doctor* court. Accordingly, we find that the fugitive forfeiture rule as applied in the instant case does not provide an independent and adequate basis to preclude federal review of Petitioner's habeas claims and we shall therefore consider these claims.[7]

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[7]We therefore do not reach the issues of whether there existed cause for the petitioner's default and resultant prejudice or whether the refusal to consider the merits of Mr. Kindler's claims would result in a miscarriage of justice.

(EXCERPT)

[J-47-98]
THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	No. 151 Capital Appeal Docket
	:	Appeal from the August 9, 1996, Order of the Court of Common Pleas of Philadelphia County, Trial Division, Criminal Section, at Information Nos. 2747, 2748, 2750 August Term, 1982, Denying Appellant's Petition under the Post Conviction Relief Act.
v.	:	
JOSEPH KINDLER, Appellant	:	
	:	SUBMITTED: February 27, 1998

OPINION

MADAME JUSTICE NEWMAN

DECIDED: DECEMBER 11, 1998

Presently before this Court is the appeal of Joseph Kindler (Appellant) from the Order of the

Court of Common Pleas of Philadelphia County, which, on August 9, 1996, denied his petition under the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546 (1988) (PCRA). For the reasons that follow, we affirm the Order of that court.

On November 15, 1983, Appellant was convicted by a jury of murder in the first degree,[1] kidnapping,[2] and conspiracy[3] in the killing of twenty-two-year-old David Bernstein.

* * * *

After Appellant's penalty hearing, the jury found two aggravating circumstances; that the victim was a prosecution witness to a felony committed by the Appellant and that the victim was killed for the purpose of preventing his testimony against Appellant in a criminal proceeding (42 Pa.C.S. § 9711(d)(5)), and that the killing was perpetrated in the commission of a felony (kidnapping) (42 Pa.C.S. § 9711(d)(6)). The jury found no mitigating circumstances.

Appellant filed Post-Verdict Motions that were pending when he escaped from the maximum-security block of the Philadelphia Detention Center

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[1]18 Pa.C.S. § 2502(a).

[2]18 Pa.C.S. § 2901.

[3]18 Pa.C.S. § 903.

on September 19, 1984.[4] Because of Appellant's fugitive status, the Commonwealth filed a Motion to Dismiss his Post-Verdict Motions. The trial court held a hearing on this motion, after which it determined that, because Appellant had voluntarily removed himself from the jurisdiction of the court, he had waived his right to have his Post-Verdict Motions considered and, accordingly, granted the Motion to Dismiss. Sentencing was deferred until Appellant was apprehended.

Appellant remained at large until his arrest in Quebec, Canada, on April 26, 1985. He was held in Canadian custody (while he challenged extradition) until October 23, 1986, when he escaped from a Montreal prison by breaking through a skylight and lowering himself thirteen stories to the ground on a rope of bedsheets. A fellow inmate, who was escaping with Appellant, fell from the rope to his death. Subsequently, the television program "America's Most Wanted" aired a story on Appellant, and in September 1988, he was spotted and arrested in New Brunswick, Canada.

Appellant was finally returned to Pennsylvania, and on October 2, 1991, sentenced to death for

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[4]Appellant apparently made his escape, along with another inmate, through the window of a third inmate's cell where a steel bar had been sawed through and the glass broken.

the murder of David Bernstein. A direct appeal to this Court followed.

On February 9, 1994, this Court affirmed the judgment of sentence.[5] In the Opinion Announcing the Judgment of the Court, Justice Papadakos, writing for a plurality of the Court, determined that the trial court's action in dismissing Appellant's Post-Verdict Motions in response to his escape from custody and flight was not error.[6] Accordingly, we found that the appeal came to us with no allegations of error preserved. However, we did undertake a review of (1) whether sufficient evidence was presented at trial to support

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[5]*Commonwealth v. Kindler*, 536 Pa. 228, 639 A.2d 1 (1994).

[6]Justice Cappy filed a concurring opinion stating that he would hold that, "the post-verdict motions of an ex-fugitive may be reinstated in the court's discretion if, after being returned to custody, the fugitive can show a compelling reason for having his post-verdict motions heard." *He did find, however, that under the facts of Appellant's case, the trial court possessed full authority to dismiss his post-verdict motions.*

Justice Flaherty (now Chief Justice Flaherty) joined Justice Cappy's concurring opinion and filed his own concurring opinion stating that he would go somewhat further and "require that a compelling reason of the most extraordinary nature be present before the post-verdict motions of an ex-fugitive may be reinstated" (*which reasons were not present in Appellant's case*).

Appellant's conviction of murder in the first degree;[7] (2) whether the sentence of death was the product of passion, prejudice or any other arbitrary factor; (3) whether the evidence supported the finding of at least one specified aggravating circumstance; and, (4) whether the sentence was excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.[8] After our review of the record we sustained Appellant's conviction of murder in the first degree and affirmed the sentence of death. *There were no dissents.* The United States Supreme Court denied Appellant's Writ of Certiorari on October 11, 1994.

On January 11, 1996, Appellant filed a PCRA Petition. In it he raised allegations of ineffective assistance of trial and successor counsel, and submitted that as a matter of "fundamental fairness" he should have those claims, as well as claims previously raised in his direct appeal, heard and considered on their merits by the courts of this Commonwealth. The Court of Common Pleas of Philadelphia County (PCRA court) dismissed the

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[7]The duty to review the sufficiency of the evidence in death penalty cases is self-mandated and stems from *Commonwealth v. Zettlemoyer*, 500 Pa. 16, 454 A.2d 937 (1982), *cert. denied* 461 U.S. 970 (1983).

[8]This review is mandated by the Sentencing Code, 42 Pa.C.S. § 9711(h).

Petition without a hearing on April 15, 1996. In its opinion, the PCRA court stated that, since this Court had already decided that Appellant's decision to become a fugitive resulted in the waiver of all issues, he was not entitled to PCRA relief. The PCRA court also noted that Appellant's post-conviction actions manifested his complete contempt for the legal process and also a "conscious intent" not to avail himself of whatever legal review he was entitled to in Pennsylvania. After being denied relief in the lower court, Appellant again decided to invoke Pennsylvania legal process and appealed to this Court.[9]

In this Court, Appellant claims that the dismissal of his PCRA Petition was an abuse of discretion because there was no present connection between his 1984-1991 fugitive status and the PCRA court's ability to review the merits of his claims in his 1996 collateral attack. Distilled to its essence, Appellant has presented a simple issue, that the court below erred in dismissing his PCRA Petition. However, for the reasons explained below, Appellant was ineligible for PCRA relief.

To be eligible for PCRA relief a petitioner must establish that his conviction or sentence

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[9]42 Pa.C.S. § 9546(d), in effect at the time Appellant filed his PCRA Petition, provided that a final order disposing of an Appellant's post-conviction petition in a death penalty case was directly appealable to this Court.

resulted from one or more of the enumerated errors or defects listed in 42 Pa.C.S. § 9543(a)(2)[10] *and*

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[10]42 Pa.C.S. § 9543(a)(2), in effect at the time Appellant filed his PCRA Petition, provided:

That the conviction or sentence resulted from one of the following:

(i) A violation of the Constitution of Pennsylvania or laws of this Commonwealth or the Constitution of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable determination of truth or innocence could have taken place.

(iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused an individual to plead guilty.

(iv) The improper obstruction by Commonwealth officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.

(v) A violation of the provisions of the Constitution, law or treaties of the United States which would require the granting of Federal habeas corpus relief to a State prisoner.

(vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and

(continued...)

that the issues that he raises have not been previously litigated. Commonwealth v. Crawley, 541 Pa. 408, 413, 663 A.2d 676, 678 (1995) (emphasis added). An issue has been previously litigated if the highest appellate court in which the petitioner could have had review has ruled on the merits of the issue. *Id.*, 663 A.2d at 678, 42 Pa.C.S. §9544 (a)(2). In the instant matter, Appellant's claim was previously litigated in his 1994 appeal to this Court when Appellant challenged the trial court's dismissal of his Post-Verdict Motions and argued that it was an abuse of discretion not to allow him to have his post-trial motions considered once he was recaptured. After our review of Appellant's arguments we found them baseless, and determined that the appeal had come to us "without any allegations of error (direct or collateral)

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[10](...continued)
that would have affected the outcome of the trial if it had been introduced.

(vii) The imposition of a sentence greater than the lawful maximum.

(viii) A proceeding in a tribunal without jurisdiction.

preserved."[11] *Kindler*, 536 Pa. at 234, 639 A.2d at 3.

This Court's decision in Appellant's direct appeal rested on a firm foundation based, in part, on *Commonwealth v. Passaro*, 504 Pa. 611, 476 A.2d 346 (1984). In *Passaro*, this Court decided that a defendant, whose direct appeal was quashed because of his escape from custody during the pendency of that appeal, was not entitled to have his appeal reinstated following his recapture. In so doing we reiterated that, "a defendant who deliberately chooses to bypass the orderly procedures afforded one convicted of a crime for challenging his conviction *is bound by the consequences of his decision*." *Id.* at 613, 476 A.2d at 347 (emphasis added). We also emphasized that a defendant's escape operated as a rejection of the legitimate means afforded him for challenging his conviction, and we found no reason that a fugitive's "apprehension, which he in no way intentionally assisted,

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[11]It is important to note that all six Justices participating in the decision of Appellant's case agreed that Appellant's judgment of sentence should be affirmed. Although Justice Cappy and Justice Flaherty (now Chief Justice Flaherty) wrote separately to suggest that a returned fugitive's post-verdict motions should be reinstated under certain circumstances, both agreed that no such circumstances were present in Appellant's case and that the trial court correctly dismissed Appellant's post-verdict motions.

should entitled him to rights *already forfeited*." *Id.* at 615, 476 A.2d at 349 (emphasis added).

We also reviewed cases from the United States Supreme Court in making our decision in Appellant's direct appeal, including *Molinaro v. New Jersey*, 396 U.S. 365 (1970).[12] In *Molinaro*, the Appellant appealed his state conviction to the Supreme Court, and then became a fugitive while the appeal was pending. The Court dismissed the appeal, stating that the Appellant's flight "disentitled" him from calling upon the resources of the Court for the determination of his claims. *Id.* at 366.

We noted that, although *Molinaro* was not binding upon us, we did find its logic persuasive and that it aided us in our conclusion that our own courts, when faced with a fugitive defendant, have the right to dismiss pending post-verdict motions. Accordingly, we found that the dismissal of Appellant's post-verdict motions was proper and that the

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[12]We also cited to *Ortega-Rodriguez v. United States*, 507 U.S. 234 (1993), for the proposition that where there is a connection between a defendant's fugitive status and the appellate process, the sanction of dismissal of the appeal was a reasonable response. The Court in *Ortega-Rodriguez* did, however, remand the matter for a determination of whether a defendant's flight and recapture occurring before his appeal had sufficient connection to his appeal to justify its dismissal.

appeal came to us, as previously stated, with no allegations of error (direct or collateral) preserved.

To grant Appellant the relief he requests in his PCRA, an evidentiary hearing on claims already *forfeited* by his flight from captivity, would render meaningless all previous rulings of the trial court and of this Court. Appellant has presented us with no reason to disregard all prior decisions validly and legitimately entered and we will not do so. What we stated in 1994 still holds true:

> [I]t would be anomalous to permit Appellant to prevail on this claim and then to subject the trial court to a remand order requiring it to rule on the merits of these same [issues] which were raised, or which could have been raised, at an earlier time and which could have been addressed had Appellant demonstrated some respect for the trial court and legal process.

Kindler at 228, 639 A.2d at 4. Accordingly, we find that the PCRA court did not err in dismissing Appellant's Petition for Relief.[13]

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[13]Appellant also argues that, because this is a capital case, he should be given the benefit of the "relaxed waiver" rule under *Commonwealth v. Zettlemoyer*, 500 Pa. 16, 454 A.2d 937 (1982), *cert. denied*, 461 U.S. 970 (1983). This

(continued...)

Mr. Justice Zappala concurs in the result.

Mr. Justice Nigro concurs in the result.

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[13](...continued)
doctrine permits the review of claims in capital cases even if there has been a procedural default in the history of the case. What Appellant misapprehends however, is that it was not a procedural default that precluded review of his claims, but rather his own act of becoming a fugitive that resulted in the forfeiture of the right to review of those claims.

J-16-1993

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 155 Eastern District Appeal Docket 1991
Appellee	:	
	:	Appeal from the Judgment of Sentence of the Court of Common Pleas of Philadelphia County, Criminal Trial
v.	:	Division, Entered on February 28, 1992, at Nos. 2747, 2748 & 2750 August Term, 1982.
	:	
	:	ARGUED: January 27, 1993
JOSEPH KINDLER,	:	
	:	REARGUED:
Appellant	:	October 18, 1993

OPINION ANNOUNCING
THE JUDGMENT OF THE COURT

MR. JUSTICE PAPADAKOS

DECIDED: February 9, 1994

On November 15, 1983, Joseph Kindler (Appellant) was convicted by a jury before the Honorable John A. Geisz of the Court of Common Pleas of Philadelphia County of murder of the first degree, kidnapping and criminal conspiracy. As required by the Sentencing Code, 42 Pa.C.S. § 9711, a sentencing hearing was held, and the same jury determined that two aggravating circumstances existed, *i.e.*, that the victim (22 year old David Bernstein) was a prosecution witness to a felony committed by the defendant and that the victim was killed for the purpose of preventing his testimony against Appellant in a criminal proceeding (42 Pa.C.S. § 9711(d)(5)), and that the defendant committed the killing while in the perpetration of a felony (kidnapping) (42 Pa.C.S. § 9711 (d)(6)). The jury did not specifically find that any mitigating circumstances were present, and, as required by the Sentencing Code, 42 Pa.C.S. § 9711(c)(1)(iv), fixed a sentence of death on November 16, 1983.

Post-verdict motions were then filed on Appellant's behalf, but before these motions could be disposed, on September 19, 1984, Appellant escaped from the maximum security block of the Philadelphia Detention Center and became a fugitive from justice. The Commonwealth filed a petition to dismiss the post-verdict motions because of Appellant's status as a fugitive from justice, and Judge Geisz held a hearing on the petition following which he determined that because Appellant

had voluntarily removed himself from the jurisdiction of the court, he waived whatever rights he might have had to have his post-verdict motions considered and disposed. The petition was granted and formal sentencing was deferred until such time as Appellant would be returned to Pennsylvania.

Appellant remained at large until April 26, 1985, when he was arrested near St. Adele in the Province of Quebec, Canada, on criminal and immigration charges. On July 3, 1985, the United States requested Appellant's extradition which was granted on January 17, 1986, by the Minister of Justice. Appellant sought to review that decision in the Canadian Courts and, once again, during the review process, Appellant escaped from the Parthenais Prison in Montreal on October 23, 1986, and remained a fugitive for almost two years, until after information on Appellant was broadcast on a television program "America's Most Wanted." Appellant was spotted and arrested in St. John, Province of New Brunswick and returned to custody in September 1988. The Supreme Court of Canada ultimately affirmed the decision of the Minister of Justice (*Kindler v. Canada (Minister of Justice*) [1991] 2 S.C.R. 779, 8 C.R. (4th) 1, 11-12, 22, 25, 30, 33-35), on September 26, 1991, and Appellant was returned to Philadelphia that day.

Following his return, Appellant was sentenced to death on October 2, 1991, and this direct appeal followed.[1]

At the outset, we must determine whether the trial court's action in dismissing Appellant's post-verdict motions as a response to Appellant's escape from custody and flight while these post-verdict motions were being considered was error. Appellant argues that it was an abuse of discretion to dismiss his post-verdict motions and allegations of ineffective assistance of counsel or not to allow him to have these motions considered once he was recaptured and returned to Pennsylvania. Furthermore, he asks that these motions be considered at this time and that the record in this matter be remanded to the trial court so that it can fulfill its duty to dispose of his post-verdict motions on the merits.

As a general rule, we have concluded that defendants who are fugitives from justice during the appellate process have no right to any appellate review, even though they have been recaptured and returned to the custody of Pennsylvania. *Commonwealth v. Passaro*, 504 Pa. 611, 476 A.2d 346

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[1]The trial court also imposed a consecutive sentence of ten to twenty years of imprisonment for Appellant's conviction of kidnapping (18 Pa.C.S. § 2901) and a concurrent five to ten year sentence for his criminal conspiracy conviction (18 Pa.C.S. § 903).

(1984). This rule is applicable to capital cases, and would normally require that we dismiss the various allegations of ineffective assistance of trial counsel, prosecutorial misconduct, and trial court error that a defendant would normally wish to raise on a direct review of a death sentence.

Here, however, Appellant's fugitive status did not take place during the pendency of an appeal before us. Rather, it took place while the trial court was considering Appellant's post-verdict motions and the question becomes whether the trial court has authority to dismiss such motions as a response to an Appellant's flight. The United States Supreme Court has recently reviewed its own case law which permits its appellate courts to dismiss pending fugitive appeals and has reaffirmed the principle that where there is a connection between a defendant's fugitive status and the appellate process, the sanction of dismissal of the appeal is a reasonable response. *Ortega-Rodriguez v. United States*, 507 U.S. ___, 122 L. Ed.2d 581, 113 S.Ct. 1199 (1993).

This rule, like our counterpart to it, rests in part on a recognition that one who invokes the jurisdiction of a tribunal and then flees has voluntarily waived or disentitled himself to call upon the resources of the Court for a determination of his claims. *Molinaro v. New Jersey*, 396 U.S. 365, 366, 24 L.Ed.2d 586, ___, 90 S.Ct. 498 (1970); *Commonwealth v. Passaro*, 504 Pa. 611, 476 A.2d 346

(1984). The Court in *Ortega-Rodriguez* made it clear that the reasoning of *Molinaro* is equally applicable in federal district courts and authorizes the district court to fashion an appropriate response to the contemptuous disrespect manifested by flight, to protect its own dignity.

While *Ortega-Rodriguez* and *Molinaro* are not binding on us, their logic is persuasive and compel us to conclude that our trial courts, when faced with a defendant in fugitive status, also have every right to fashion an appropriate response which can include the dismissal of pending post-verdict motions. Our review of that action is limited to determining whether the flight has a connection with the court's ability to dispose the defendant's case and whether the sanction imposed in response to the flight is reasonable under the circumstances.

Here, Appellant submitted post-verdict motions for the trial court to consider but rather than allowing the judicial process to take its course Appellant chose to escape and flee. Appellant's voluntary absence at this stage of the proceedings invites a response of dismissal, firstly, to allow the court to move on to the cases of others whose whereabouts are known and who are in a position to appeal from the court's order disposing of their case and, secondly, as a means of allowing the trial court to defend its own dignity, by sanctioning an

act of defiance that occurred solely within its domain.

The connection to the trial court process is real because Appellant's conduct demonstrated absolute disrespect for the legal process and for the authority of the court and we conclude that the action taken in dismissing the post-verdict motions was a reasonable response to Appellant's "flouting" of the authority of the court and is, therefore, affirmed.

Accordingly, we cannot permit Appellant to resurrect his post-verdict motions, various allegations of ineffective assistance of trial counsel, prosecutorial misconduct and trial court error at this time, thereby, allowing him to benefit from his contemptuous disrespect for the trial court. Furthermore, it would be anomalous to permit Appellant to prevail on this claim and then to subject the trial court to a remand order requiring it to rule on the merits of these same post-verdict motions and other collateral claims which were raised, or which could have been raised, at an earlier time and which could have been addressed had Appellant demonstrated some respect for the trial court and legal process.

Thus, this appeal comes to us without any allegations of error (direct or collateral) preserved, much like those cases where an Appellant either choses not to raise any issues related to the trial

and sentencing hearing[2] or as in those cases where the Appellant is a fugitive during the appellate process.

In *Commonwealth v. Judge*, 530 Pa. 403, 609 A.2d 785 (1992), we noted that when we review the death sentence of a fugitive from justice, because of the mandatory nature of our review of all death sentences under our Sentencing Act, we will exercise a limited review, which is confined to determining: 1) whether sufficient evidence was presented at trial to support the conviction of murder of the first degree;[3] 2) whether the sentence of death is the product of passion prejudice, or any other arbitrary factor; 3) whether the evidence fails to support the finding of at least one specified aggravating circumstance; and, 4) whether the sentences are excessive or disproportionate to the penalty imposed in similar cases, considering both

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[2]*Commonwealth v. Heidnik*, 526 Pa. 458, 587 A.2d 687 (1991); *Commonwealth v. Appel*, 517 Pa. 529, 539 A.2d 780 (1988).

[3]The duty to review the sufficiency of the evidence in death penalty cases is self-mandated and stems from *Commonwealth v. Zettlemoyer*, 500 Pa. 16, 454 A.2d 937 (1982), *cert. denied* 461 U.S. 970, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983), and is conducted regardless of whether the Appellant raises the sufficiency of the evidence as an issue.

the circumstances of the crime and the character and record of the defendant.[4]

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[4]The Sentencing Act provides:

(h) Review of death sentence.--

(1) A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules.

(2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for further proceedings as provided in paragraph (4).

(3) The Supreme Court shall affirm the sentence of death unless it determines that:

(i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;

(ii) the evidence fails to support the finding of at least one aggravating circumstance specified in subsection (d); or

(iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.

(4) If the Supreme Court determines that

(continued...)

With these limitations in mind, we begin by reviewing the record to determine whether sufficient evidence was presented to support the jury's verdict of murder of the first degree. In reviewing the sufficiency of the evidence, we are guided by the well-established principle that we view the evidence and all the reasonable inferences drawn therefrom, in the light most favorable to the Commonwealth as the verdict winner, to determine whether sufficient evidence was presented to enable the jury to find every element of the crime beyond a reasonable doubt. *Commonwealth v. McNair*, 529 Pa. 368, 603 A.2d 1014 (1992); *Commonwealth v. Bryant*, 524 Pa. 564, 574 A.2d 590 (1990). Applying this standard, we can easily conclude that evidence sufficient beyond a reasonable doubt exists in this record to support the jury's verdict of murder of the first degree.

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[4](...continued)
the death penalty must be vacated because none of the aggravating circumstances are supported by sufficient evidence or because the sentence of death is disproportionate to the penalty imposed in similar cases, then it shall remand for the imposition of a life imprisonment sentence. If the Supreme Court determines that the death penalty must be vacated for any other reason, it shall remand for a new sentencing hearing pursuant to subsections (a) through (g).

42 Pa.C.S. § 9711(h).

The evidence submitted at trial discloses that on April 2, 1982, the Sound Odyssey store in Lower Moreland Township, Bucks County, was burglarized. A Lower Moreland Township patrol officer noticed a vehicle with its lights out pulling out of the cul-de-sac behind the Sound Odyssey at a high rate of speed and further noticed three persons inside the vehicle. Police were able to stop this vehicle, but the driver fled and was not apprehended. The two remaining passengers of this vehicle, Scott Shaw (Shaw), a sixteen-year old juvenile and the victim, David Bernstein (Bernstein) were detained and arrested. While in police custody, Bernstein identified Appellant as the driver of the vehicle and furthermore told the police that the burglary was Appellant's idea and that he would be willing to testify against Appellant and Shaw. This information was then conveyed to the Philadelphia Police, since Appellant lived in Philadelphia, and the police secured a warrant for Appellant's arrest.

The police executed the warrant by going to Appellant's home and, after a struggle, handed Appellant a copy of the warrant which clearly named Bernstein as the informant.[5] Appellant was

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[5]The Affidavit of Probable Cause served on Appellant stated in pertinent part:

> After being advised of his Miranda Warnings

(continued...)

arrested and charged with the burglary of Sound Odyssey, along with other theft-related offenses at other locations in three counties. Following a preliminary hearing, Appellant was held for court in Montgomery County for the Sound Odyssey theft and Appellant filed a motion to quash the charges against him, claiming that the evidence presented at the preliminary hearing was insufficient. A hearing was scheduled on this motion for July 23, 1982, and the Montgomery County District Attorney's Office obtained an order granting Bernstein immunity so that he could testify at this hearing. Bernstein's attorney informed Appellant's attorney that his client had been immunized for the July 23, 1982, hearing and that, if called to the stand, he would testify.

At the July 23, 1982, hearing Bernstein appeared pursuant to the immunity order but Appellant did not appear, nor did his counsel and the motion to quash was dismissed with prejudice.

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[5](...continued)
David Bernstein admitted his involvement in the burglary of Sound Odyssey and when questioned about the third person observed in the truck stated it was Joseph Kindler. David Bernstein said he and Joseph Kindler entered the building by a rear window. David Bernstein stated that Joseph Kindler was the operator of the vehicle when it left the scene of the burglary at Sound Odyssey.

Trial was set for August 17, 1982, and Bernstein, fearing that Appellant might try to prevent him from testifying, planned to move back home with his parents on July 25, 1983, according to testimony provided by the victim's mother.

Appellant complained to Shaw and Shaw's girlfriend, Michelle Raifer (Raifer), that he had to get rid of Bernstein because he would testify against him and discussed several plans with them for eliminating Bernstein, including drowning him in the Delaware River. On July 24, 1982, Appellant met with Raifer, who arranged to get her mother's car and to meet Appellant and Shaw. That evening the three met and drove the car to within a block of Bernstein's apartment. Raifer called Bernstein and established that he was home and Appellant instructed Raifer to leave and return to the apartment later in the evening with the car. At this time, Appellant placed an inner tube and flippers into the trunk of the automobile.

Appellant and Shaw then hid in a field near Bernstein's apartment to watch the door. Raifer returned between 2:30 and 2:45 a.m. on July 25, 1982, and Appellant, holding a black baseball bat, met her outside the apartment. Appellant told Raifer to ring the doorbell and to get Bernstein to come outside while Appellant, armed with his baseball bat, hid in the alleyway right next to the door to the apartment building.

Raifer did as she was instructed. Bernstein opened the door and had a conversation with Raifer and after some time Appellant pulled the door fully open, dragging out Bernstein and began beating him over the head with the baseball bat approximately 20 times. Shaw also appeared on the scene and Appellant instructed him to hit Bernstein with an electric prod, which he did five times in the ribs. At this point Bernstein was rendered immobile and Appellant and Shaw dragged their victim to Raifer's waiting automobile, leaving a thirty-foot long trail of blood stains, and threw him into the trunk. Appellant, Raifer and Shaw got into the car and drove with Bernstein still moaning in the trunk, for seven miles to a point on the River Road on the Delaware River. Appellant and Shaw then took Bernstein out of the trunk and as they began to throw Bernstein's body into the river, Appellant told Raifer to drive back to the main road and wait for them. Raifer drove off, but returned soon to find Appellant and Shaw emerging from the river. All three re-entered the automobile and Appellant explained that Bernstein's body wouldn't sink so they had to fill his lungs with water and tie a cinder block around his neck to weigh the body down.

On the way back to Philadelphia, Raifer was instructed to stop the car so that Appellant could throw away the baseball bat, clothes and shoes he and Shaw had used during the murder. These items were tossed into various sewer inlets along

Grant Street. The police later recovered the blood-stained baseball bat, shirt, pants and shoes that Appellant wore, and Shaw's t-shirt and shoes.

When the three returned to Appellant's home, they tried to wash the blood stains out of the trunk, using a styrofoam ice chest to carry out the water. They then broke up the ice chest and threw it and the trunk mat of Raifer's automobile into another sewer inlet. The pieces of broken ice chest and the trunk mat, the swimming suits that Appellant and Shaw were wearing, the inner tube, electric prod and a camouflage shirt that Appellant had worn were all later recovered from this sewer inlet by the police.

There was also testimony provided by one of Bernstein's neighbors (Craig Satinsky) that he heard Bernstein being beaten and a car driving away and that when he came outside to investigate he saw Bernstein's apartment door open with Bernstein's girlfriend sitting there. By this time the girl was hysterical and corroborated Satinsky's suspicion that it was Bernstein that he heard being beaten and dragged off in an automobile. They both went out to the street and saw the trail of blood and Bernstein's girlfriend, Lisa Rothbarth, called the police giving them information which led them to look for Raifer's car. Within a few hours, the police intercepted Raifer at her home and seized the blood-soaked car. Raifer eventually confessed, identified Shaw and Appellant as

Bernstein's murderers, and led the police to the various sewer inlets, where as already indicated, they retrieved the various items used in connection with the murder.

On July 26, 1982, at around 7:30 p.m., Bernstein's body surfaced in the Delaware River near River Road. The body had a cinder block tied to its neck. Multiple blows to the head were observed which were later shown by a medical examination to be consistent with blows from a bat and bruises were seen to the chest consistent with being made by the electric prod. The forensic medical examination also revealed that, prior to expiring, Bernstein ingested water and silt. The cause of death was identified as drowning and massive head injuries.

Raifer's direct, eyewitness testimony was more than sufficient for a jury to conclude beyond a reasonable doubt that Bernstein's death was a homicide. The Crimes Code defines murder of the first degree as, "[a] criminal homicide . . . committed by an intentional," i.e., "willful, deliberate and premeditated killing." 18 Pa.C.S. § 2502(a),(d). From the use of a deadly weapon on a vital part of the body, the jury could infer that the killing was intentional and malicious. *Commonwealth v. Rolan*, 520 Pa. 1, 549 A.2d 553 (1988). From the manner of the killing, the jury could conclude that the killing was premeditated and the jury could conclude that Appellant committed the crime from the direct evidence linking him with the crime.

Accordingly, we are more than satisfied that sufficient evidence exists in this record to support the jury's verdict of murder of the first degree.

At the penalty hearing, immediately following the verdict, the jury found the existence of the following aggravating circumstances: that the victim was a prosecution witness to a felony committed by the defendant and was killed for the purpose of preventing his testimony against him in a criminal proceeding involving that offence, 42 Pa.C.S. § 9711(d)(5); and that the defendant committed the killing while in the perpetration of a felony. 42 Pa.C.S. § 9711(d)(6).

The evidence the jury heard established that Bernstein was subpoenaed as a witness by the Commonwealth for the Sound Odyssey burglary and that Bernstein was granted immunity so that he could testify against Appellant at the July 23, 1982, motion to quash proceeding. There was also direct testimony from Raifer that Appellant had to get rid of Bernstein so that he could not testify against him, and evidence that Appellant knew Bernstein had incriminated him because Appellant read the probable cause section of the arrest warrant for him where Bernstein specifically named Appellant as the perpetrator of the burglary at the Sound Odyssey. Finally, burglary is a felony, 18 Pa.C.S. § 3502. All of this evidence is sufficient to establish beyond a reasonable doubt that Bernstein was a prosecution witness to a felony (burglary)

committed by Appellant, and that Appellant had the fully formed animus to eliminate Bernstein as a potential witness in the pending criminal proceeding involving the burglary of the Sound Odyssey. Such a killing of a witness constitutes just the type of frontal assault upon the criminal justice system which we have indicated that 42 Pa.C.S. § 9711 (d)(5) seeks to address, *i.e.*, *Commonwealth v. Henry*, 524 Pa. 135, 569 A.2d 929 (1990); *Commonwealth v. Appel*, 517 Pa. 529, 539 A.2d 780 (1988); *Commonwealth v. Lark*, 518 Pa. 290, 543 A.2d 491 (1988), and we conclude that this aggravating circumstance was properly found by the jury.

The sentencing jury also determined that sufficient evidence existed to find the presence of aggravating circumstance six, namely, that Appellant committed the killing while in the perpetration of a felony. 42 Pa.C.S. § 9711(d)(6). Appellant was found guilty of kidnapping Bernstein, which is demonstrated for our purposes where a person unlawfully confines another for a substantial period in a place of isolation with the intent to facilitate the commission of a felony or to inflict bodily injury. 18 Pa.C.S. § 2901(a)(2) and (3). Here the jury heard direct evidence that Appellant incapacitated Bernstein by clubbing him twenty times in the head, then stuffing him into the trunk of a car borrowed for the specific purpose of driving this victim to the river so his body could be disposed. The seven mile, one way ride, was part of Appellant's plan to kill Bernstein and facilitated the

commission of the murder. There is no reason to disturb this finding.

In addition, since no mitigating circumstances were found which outweighed the aggravating circumstances, pursuant to 42 Pa.C.S. § 9711(c)(1)(iv), the jury was required to fix the penalty at death, and correctly returned death as its sentence.

We have studied this record and conclude that the sentence of death, being mandated, is neither excessive nor disproportionate to the penalty imposed in similar cases. See *Commonwealth v. Frey*, 504 Pa. 428, 475 A.2d 700 (1984); *cert. denied*, 469 U.S. 963, 105 S.Ct. 360, 83 L.Ed.2d 296 (1984) (and Appendix attached thereto).

Finally, after our review of this record, we conclude that the sentence of death was a product of the evidence and not a product of "passion, prejudice or any other arbitrary factor." 42 Pa.C.S. § 9711(h)(3).

Accordingly, we sustain the conviction of murder of the first degree and affirm the sentence of death.[6]

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[6]The Prothonotary of the Supreme Court of

(continued...)

MR. JUSTICE LARSEN did not participate in the decision of this case.

MR. JUSTICE FLAHERTY files a Concurring Opinion and joins the Concurring Opinion authored by MR. JUSTICE CAPPY.

MR. JUSTICE ZAPPALA joins the Concurring Opinion authored by MR. JUSTICE CAPPY.

MR. JUSTICE CAPPY concurs in the result reached by the majority and also filed a Concurring Opinion in which MR. JUSTICE FLAHERTY and MR. JUSTICE ZAPPALA join.

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[6](...continued)
Pennsylvania is directed to transmit the full and complete record of the trial, sentencing hearing, imposition of sentence and review by this Court to the Governor. 42 Pa.C.S. § 9711(i).

J-16-1993

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 155 Eastern District Appeal Docket 1991
Appellee	:	
	:	Appeal from the Judgment of Sentence of the Court of Common
v.	:	Pleas of Philadelphia County, Criminal Trial Division, Entered on February 28, 1992, at Nos. 2747, 2748 & 2750 August Term, 1982.
JOSEPH KINDLER,	:	
	:	ARGUED:
Appellant	:	January 27, 1993

CONCURRING OPINION

MR. JUSTICE CAPPY

Decided: February 9, 1994

I write separately to express my disagreement with the rationale of *Commonwealth v. Passaro*, 504 Pa. 611, 476 A.2d 346 (1984), and my continued disagreement with the holding of

Commonwealth v. Judge, ___ Pa. ___, 609 A.2d 785 (1992) (Cappy, J., dissenting). However, I am constrained to concur in the plurality's present result under the unique facts of the case *sub judice*.

In *Passaro*, this Court held that an appellant, by becoming a fugitive after having been convicted and sentenced, had forfeited his right to have his appellate claims considered. While I agree that it is proper to quash the appeal of a fugitive pursuant to Pa.R.A.P. 1972(6), when the individual is still an active fugitive, I would hold that such an appeal may be reinstated in the court's discretion if, after being returned to custody, the fugitive-appellant can show a compelling reason for having his claim heard. *See Commonwealth v. Passaro*, 504 Pa. 611, 476 A.2d 346, 349-350 (1984) (Zappala, J., concurring in the result). In *Judge*, this Court held that the rationale employed in *Passaro* extended to individuals who had become fugitives after having been both convicted of first-degree murder and sentenced to death, to the extent that the appellant had waived his right to appellate review of all issues excepting those guaranteed under 42 Pa.C.S.A. § 9711 (h), and the issue of sufficiency of the evidence. *Commonwealth v. Zettlemoyer*, 500 Pa. 16, 454 A.2d 937 (1982), *cert. denied*, 461 U.S. 970, 103 S.Ct. 2444, 77 L.Ed.2d 1327, *reh'g denied*.

I would emphatically state that Appellant's absence before sentencing had little or no direct

effect on his appellate rights.[1] Though not controlling, the recent United States Supreme Court's decision in *Ortega-Rodriguez v. United States*, 122 L.Ed.2d. 581 (1993), is persuasive in our analysis. *Ortega-Rodriguez* held that the appeal of a fugitive, who had escaped before sentencing, but has since been recaptured, may not be dismissed by an appellate court unless the actions of the accused had some impact on the appellate process. However, under the instant facts, I am constrained to agree that the *trial court* possessed full authority to dismiss Appellant's post-verdict motions by virtue of Appellant's escape and absence while those motions were pending.

However, contrary to my bretheren in the plurality, I would expressly hold that the post-verdict motions of an ex-fugitive may be reinstated in the trial court's discretion if, after being returned to custody, the fugitive can show a compelling reason for having his post-verdict motions heard. This conclusion parallels that of Mr. Justice Zappala as stated in his dissent in *Passaro*, that the appeal of an ex-fugitive should be reinstated in the

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[1]Appellant's absence indirectly affected his appellate rights in that it resulted in his failure to preserve issues raised in post-verdict motions which were at that time properly dismissed because of Appellant's absence. Obviously, an issue not properly raised in post-verdict motions is not properly preserved for appellate review, must be considered waived, and may not be considered on appeal.

appellate court's discretion if, after being returned to custody, the fugitive-appellant can show a compelling reason for having his claim heard.

Messrs. Justice Flaherty and Zappala join this Concurring Opinion.

[J#16-1993]

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	**: No. 155 Eastern District Appeal Docket : 1991**
v.	**: Appeal from the : Judgment of Sentence of the Court**
JOSEPH KINDLER, Appellant	**: of Common Pleas : of Philadelphia : County, Criminal : Trial Division, : Entered on February 28, 1992, at Nos. : 2747, 2748 & 2750 : August Term, 1982.**
	: ARGUED: : January 27, 1993
	: REARGUED: : October 18, 1993

CONCURRING OPINION

MR. JUSTICE FLAHERTY

Decided:
February 9, 1994

I join the concurring opinion authored by Mr. Justice Cappy, but would go somewhat further perhaps and require that a compelling reason of the *most extraordinary nature* be present before the post-verdict motions of an ex-fugitive may be reinstated. Although not present in this case, there could be circumstances which would make mechanical adherence to a *per se* rule inconsistent with Anglo-American notions of fairness and justice, especially where one has been sentenced to death.

OPPOSITION BRIEF

(8)

FILED
APR 16 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CASE NO. 08-992

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY A. BEARD, Secretary, Pennsylvania Department of Corrections, *et al.*,

Petitioners,

v.

JOSEPH J. KINDLER,

Respondent.

RESPONDENT'S MOTION AND AFFIRMATION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent, Joseph Kindler, through counsel, respectfully moves for leave to proceed *in forma pauperis* and submits as follows:

1. This case is before the Court on a petition for writ of certiorari.

2. Respondent, a death-sentenced prisoner, is indigent. He was found to be indigent and *in forma pauperis* relief was granted by the state courts, by the United States District Court for the Eastern District of Pennsylvania and by the United States Court of Appeals for the Third Circuit. Because of his indigence, his lawyers have always been court-appointed.

3. Undersigned counsel was appointed by the Court of Appeals to represent Respondent, and continues to represent him *pro bono*.

4. Respondent is incarcerated on death row and is without funds to secure the services necessary to proceed in this Court (e g , printing fees, etc.) or to pay any fees.

5. Respondent will shortly provide the Court an Affidavit or Declaration in Support of

a Motion for Leave to File *In Forma Pauperis*.

6. Undersigned counsel affirms that all statements related above are true and correct.

WHEREFORE, Respondent requests that the Court allow him to proceed *in forma pauperis*.

Respectfully submitted,

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Counsel for Respondent, Joseph Kindler

Dated: April 16, 2009

CASE NO. 08-992

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY A. BEARD, Secretary, Pennsylvania Department of Corrections, *et al.*,

Petitioners,

v.

JOSEPH J. KINDLER,

Respondent.

AFFIRMATION OF MAILING

I, Matthew C. Lawry, a member of the Bar of the United States Supreme Court, hereby affirm under penalty of perjury that on this 16th day of April, 2009, I placed the original and ten copies of the Brief in Opposition to Petition for Writ of Certiorari in the above-captioned case, along with the motion for leave to proceed in forma pauperis, and this affirmation, in the United States Mail for delivery to the United States Supreme Court, 1 First Street, NE, Washington, D.C. 20543, and a copy of each to counsel for Petitioners: Ronald Eisenberg, Esq., Deputy District Attorney, Philadelphia District Attorney's Office, 3 South Penn Square, Philadelphia, PA 19107. The mailing was by first class United States Mail postage prepaid.

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NO. 08-992

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY A. BEARD, Secretary,
Pennsylvania Department of Corrections, et al.,

Petitioners,

v.

JOSEPH J. KINDLER,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Respondent was convicted of first degree murder and sentenced to death. He escaped from prison while his post-verdict motions were pending. After he was recaptured, he sought to appeal his conviction and death sentence. At the time of his escape, Pennsylvania courts frequently reviewed the merits of such appeals once the defendant was recaptured, with limited exceptions for procedural circumstances not present here. By the time of Respondent's attempted appeal, Pennsylvania had a rule treating an escape as an absolute forfeiture of appellate proceedings. Pennsylvania applied that rule to bar Respondent from having the merits of any of his claims considered on direct appeal or in post-conviction proceedings. The Third Circuit applied settled Circuit precedent holding that in such circumstances, the application of the absolute forfeiture rule is not adequate to preclude federal habeas review of the merits.

When a State changes its procedural rule, after an alleged default, from a discretionary rule – which was frequently exercised to excuse the default – to one in which the default constitutes an absolute forfeiture, and then retroactively applies the absolute forfeiture rule, was the absolute forfeiture rule firmly established and consistently applied at the time of the default?

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COUNTERSTATEMENT OF THE CASE

The evidence presented by the Commonwealth at the guilt phase of the trial was summarized by the Pennsylvania Supreme Court in *Commonwealth v. Kindler*, 639 A.2d 1 (Pa. 1994) (App. 79-104).[1] The jury convicted Mr. Kindler of first degree murder, kidnapping and conspiracy. Mr. Kindler was tried together with his co-defendant, Scott Shaw, who was also convicted of first degree murder and other charges. At a joint penalty phase proceeding, Mr. Shaw was sentenced to life and Mr. Kindler was sentenced to death.

Mr. Kindler filed post-verdict motions. On September 19, 1984, while the post-verdict motions were pending and prior to formal sentencing, he escaped from jail. The trial court granted the Commonwealth's motion to dismiss the post-verdict motions, and continued sentencing indefinitely. After Mr. Kindler was recaptured, he moved to reinstate the post-verdict motions. The trial court denied his motion, formally imposed the death sentence, and sentenced him on the remaining counts.

Mr. Kindler appealed to the Pennsylvania Supreme Court. The court ruled that, as a result of his escape, he had no right to review of any issues not encompassed in its limited, statutorily mandated review in capital cases. App. 85-87. Although, at the time of the escape, there was no clearly established fugitive forfeiture or waiver rule that would bar an appeal based on an escape while post-verdict motions were pending, the state high court nevertheless refused to consider any issues raised by Mr. Kindler on appeal. App. 82-83. Finding no error in its automatic review of the conviction and death sentence, the court affirmed. App. 97.

Mr. Kindler filed a petition for state post-conviction relief. The trial court dismissed the petition without holding a hearing. The Pennsylvania Supreme Court affirmed the denial of

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[1]Emphasis herein is supplied unless otherwise indicated.

relief, ruling that the claims presented by Petitioner were previously litigated on direct appeal. *Commonwealth v. Kindler*, 722 A.2d 143 (Pa. 1998) (App. 67-78).

Mr. Kindler filed a timely petition for writ of habeas corpus under 28 U.S.C. § 2254. Following briefing by the parties, the District Court entered a lengthy and thorough Memorandum and Order. *Kindler v. Horn*, 291 F. Supp. 2d 323 (E.D. Pa. 2003) (App. 54-66). The District Court found that there was no state procedural bar adequate to preclude federal habeas review of the merits, and that Mr. Kindler was entitled to relief from his death sentence on his claim under *Mills v. Maryland*, 486 U.S. 367 (1988), and his claim of prosecutorial misconduct in the context of the joint penalty phase proceedings. The District Court denied relief on his remaining claims.

The parties cross-appealed. Following briefing and oral argument, the Third Circuit unanimously affirmed the District Court's ruling on procedural default and affirmed the grant of sentencing relief, on slightly different grounds. While it affirmed the District Court's ruling on the *Mills* claim, the Third Circuit panel overturned the grant of relief for prosecutorial misconduct, but also granted relief on Mr. Kindler's claim that counsel was constitutionally ineffective at capital sentencing. *Kindler v. Horn*, 542 F.3d 70 (3d Cir. 2008) (App. 1-53).

REASONS FOR DENYING CERTIORARI REVIEW

I. THE THIRD CIRCUIT CORRECTLY APPLIED LONGSTANDING PROCEDURAL DEFAULT LAW IN FINDING THAT THE STATE COURT'S APPLICATION OF A FUGITIVE FORFEITURE RULE THAT WAS NOT CLEARLY ESTABLISHED OR CONSISTENTLY APPLIED AT THE TIME OF THE DEFAULT WAS NOT ADEQUATE TO PRECLUDE FEDERAL HABEAS REVIEW OF THE MERITS OF MR. KINDLER'S CLAIMS.

The sole issue raised by Petitioners ("the Commonwealth") in the *Petition for Writ of Certiorari* ("PWC") concerns the Third Circuit's ruling on the procedural default question. Applying longstanding procedural default principles and Third Circuit precedent, the Third Circuit found that the fugitive forfeiture rule applied by the Pennsylvania Supreme Court to preclude review of Mr. Kindler's direct appeal and post-conviction claims was a *new* and *different* rule from that in existence at the time of the alleged default. As a result, the fugitive forfeiture rule was not "firmly established" or "consistently applied" and therefore was not an "adequate" state ground "sufficient to bar review of the merits" in federal court. App. 22.

The Commonwealth asserts that the Third Circuit's ruling raises an important question about the "role of discretion" with respect to procedural default. PWC at 7. But that assertion is based on mischaracterizations both of the rule applied in this case by the state court, and of the Third Circuit's decision on the procedural default question. When this underbrush is cleared away, it becomes clear that the Circuit merely applied longstanding procedural default principles to a long-ago shift by the Pennsylvania Supreme Court in its approach to appeals of recaptured prisoners. Therefore, the Third Circuit's ruling is both manifestly correct as an application of this Court's procedural default law, and insignificant in terms of the criteria governing this Court's exercise of certiorari review. That is particularly true because (a) the lower federal courts are familiar with state procedural rules and thus in the best position to assess adequacy,

see infra at 5 & n.5, and (b) the rule in question was rarely applied and no longer exists in the same form, depriving the adequacy issue of any broad significance. *See infra* at 8-9 n.6.

A. Governing Principles Regarding Procedural Default.

In its current form, the doctrine of procedural default was first applied to federal habeas proceedings in *Wainwright v. Sykes*, 433 U.S. 72 (1977). Since that time, there have been few significant changes in the law of procedural default, contrary to the Commonwealth's assertion, PWC at 7, that development of procedural default law has been "uneven."[2]

"Procedural default" is a doctrine of comity that *sometimes* prevents a federal habeas court from ruling on the merits of a claim when the state court denied that claim on the basis of a state law procedural rule. Not all state procedural rules, however, prevent merits review by the federal habeas courts. Federal merits review may be barred only if, *inter alia*, the state court bar ruling is an "*adequate state ground*." *E.g.*, *Lee v. Kemna*, 534 U.S. 362, 375 (2002); *Johnson v. Mississippi*, 486 U.S. 578, 587 (1986). A state procedural rule is an "adequate state ground" only if it is "firmly established" and "consistently and regularly applied" by the state courts. *Johnson*, 486 U.S. at 587; *see Ford v. Georgia*, 498 U.S. 411, 423-24 (1991) (state procedural rule must be "firmly established and regularly followed" to bar federal habeas review); *James v. Kentucky*, 466 U.S. 341, 348 (1984) (rule must be "clear," "firmly established and regularly followed").

In applying these principles, a federal habeas court must make two preliminary determinations. First, the federal court must determine *what* procedural rule the state court applied as its basis for denying relief, because only a procedural rule that was *actually applied* by the state court can ever create a bar against federal merits review – rules that hypothetically *could*

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[2]Indeed, the Commonwealth cites no significant decision regarding the adequate state ground doctrine since *Ford v. Georgia*, 498 U.S. 411 (1991), nor have Respondent's counsel discovered any such decision.

have been applied by the state court, but were not, are irrelevant.[3]

Second, the federal court must determine *when* the state court procedural default occurred. Only procedural rules that are "firmly established and regularly followed" *at the time of the state court procedural default* can be "adequate." In other words, habeas courts look to the state of the law at the time when the petitioner took or failed to take the action that eventually resulted in the state court bar against his claims, *not* the (usually later) date when the state court actually held the claims to be barred.[4] This Court has "repeatedly recognized [that] the courts of appeals and district courts are more familiar than we with the procedural practices of the States in which they regularly sit," and therefore are in the best position to assess adequacy. *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997) (declining to address procedural bar issue).[5]

As described below, and as the Court of Appeals found, there is no "adequate state ground" under these well-established principles of federal law.

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[3] *See Harris v. Reed*, 489 U.S. 255, 262, 265 n.12 (1989) (state court procedural bar rule may bar federal merits review "only if the last state court rendering a judgment in the case rests its judgment on the [rule]"; "if the state court ... chooses not to rely on a procedural bar ..., there is no basis for a federal habeas court's refusing to consider the merits of the federal claim"); *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985) ("The mere existence of a basis for a state procedural bar does not [bar federal merits review]; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case.").

[4] *E.g.*, *Ford*, 498 U.S. at 423-24 (contemporaneous objection rule not adequate because not firmly established and regularly followed at time, prior to trial, when defendant failed to object); *Terrell v. Morris*, 493 U.S. 1, 2 (1989) (per curiam) (rule requiring claims be raised on direct appeal not adequate because not firmly established and regularly followed at time of direct appeal).

[5] *Accord id.* at 547 (O'Connor, J., dissenting) ("As the Court points out, the Court of Appeals is better suited to evaluating matters of state procedure [relevant to procedural bar issues] than are we"); *Selvage v. Collins*, 494 U.S. 108, 110 (1990) (per curiam) (remanding to Court of Appeals for determination of procedural bar issue because Court of Appeals "is more familiar with [state] law than we are"); *Rummel v. Estelle*, 445 U.S. 263, 267 n.7 (1980) (rejecting state's procedural bar argument by "[d]eferring to the Court of Appeals interpretation of Texas law").

B. Pennsylvania's Treatment of Appeals by Recaptured Fugitives.

Over time, Pennsylvania's treatment of appeals by recaptured fugitives has undergone several marked changes. Much of this history, with which the Third Circuit is intimately familiar, is recounted in *Doctor v. Walters*, 96 F.3d 675, 685-86 (3d Cir. 1996), which was followed by the Third Circuit in *Kindler*.

As of 1984, the leading Pennsylvania decisions regarding the fugitive waiver rule were *Commonwealth v. Galloway*, 333 A.2d 741 (Pa. 1975), and *Commonwealth v. Passaro*, 476 A.2d 346 (Pa. 1984). Review of those cases demonstrates that there was no firmly established rule in 1984 that a fugitive had forfeited or waived his right to appellate review if he was recaptured prior to his appeal having been dismissed or quashed.

In *Galloway*, the defendant escaped while his post-verdict motions were pending. The trial court dismissed the motions with prejudice. Galloway escaped again while his appeal was pending, and the Commonwealth moved to dismiss the appeal. Galloway was again returned to custody, and the Pennsylvania Supreme Court considered both the merits of the appeal and the Commonwealth's motion to dismiss. *Galloway*, 333 A.2d at 742.

The *Galloway* court noted that an appellate court can dismiss the appeal of a defendant who is a fugitive from justice because such a person "by escaping, has placed himself beyond the jurisdiction and control of the court, and, hence, might not be responsive to the judgment of the court." *Id.* The court determined, however, that this rule did not apply to Galloway, because he had been returned to custody:

> Since Galloway is no longer a fugitive from justice and is now *subject to the jurisdiction of this Court*, he will be responsive to any judgment this Court renders. Therefore, this Court has no basis upon which to grant a motion to dismiss the appeal at this juncture. Hence, the Commonwealth's motion to dismiss the appeal will be denied.

Id. The Court then remanded to the trial court to consider Galloway's post-verdict motions. *Id.*

Galloway thus adopted a straightforward "jurisdictional" – if the defendant was returned to custody while his appeal was pending, the appeal would be heard. As the Third Circuit noted in *Doctor*, "After *Galloway*, Pennsylvania's ... courts consistently recognized their discretion to hear a properly filed appeal as long as the criminal defendant had returned to the jurisdiction before the appeal was dismissed." *Doctor*, 96 F.3d at 685 (citing *Commonwealth v. Jones*, 564 A.2d 983, 985 (Pa. Super. 1989); *Commonwealth v. Milligan*, 452 A.2d 1072 (Pa. Super. 1982); *Commonwealth v. Harrison*, 432 A.2d 1083 (Pa. Super. 1981); *Commonwealth v. Albert*, 393 A.2d 991 (Pa. Super. 1978); *Commonwealth v. Borden*, 389 A.2d 633 (Pa. Super. 1978); *Commonwealth v. Boyd*, 366 A.2d 934 (Pa. Super. 1976); *Commonwealth v. Barron*, 352 A.2d 84 (Pa. 1975)). Because Mr. Kindler was returned to the jurisdiction before his appeal or even his post-verdict motions were dismissed, under *Galloway* his appeal would have been heard.

In *Passaro*, the defendant escaped while his appeal was pending. The Superior Court granted the Commonwealth's motion to dismiss the appeal, and denied the defendant's motion to reinstate the appeal after he was apprehended. The defendant then appealed to the Pennsylvania Supreme Court. *Passaro*, 476 A.2d at 347-48.

The Supreme Court first ruled that the Superior Court acted properly in dismissing the appeal when the defendant was a fugitive. *Passaro*, 476 A.2d at 348. The Supreme Court then ruled that the Superior Court also properly denied reinstatement of the appeal, because the defendant had forfeited his appeal by escaping during the pendency of the appeal:

> [A] defendant who elects to escape from custody forfeits his right to appellate review. It would be unseemly to permit a defendant who has rejected the appellate process in favor of escape to resume his appeal merely because his

escape proved unsuccessful....

Passaro, 476 A.2d at 349.

Reviewing these decisions, the Third Circuit noted that *Passaro* did not overrule *Galloway*, but rather distinguished *Galloway* on the ground that in *Passaro* the appeal had been dismissed while the defendant was a fugitive, whereas in *Galloway* the appeal had not been dismissed. *Doctor*, 96 F.3d at 685. Accordingly, the Third Circuit concluded that, as of *1986*, Pennsylvania fugitive waiver law did not "firmly establish" that the absolute forfeiture rule of *Passaro* applied to a prisoner (like Mr. Kindler) who escaped but was returned to custody prior to the filing of an appeal:

> Pennsylvania's fugitive forfeiture rule after *Passaro* can described as follows: if the defendant is returned to custody while his appeal is pending, an appellate court has the discretion to hear the appeal, but if the defendant is returned to custody after the appeal is dismissed an appellate court lacks the discretion to reinstate and hear the appeal.
>
> It is clear from these decisions, which reflect the state of the law at the time of petitioner's escape, that Pennsylvania law afforded appellate courts different degrees of discretion depending on the posture of the appeal upon a former fugitive's return to custody. Pennsylvania law had never confronted the situation that arises in the instant case where petitioner's flight had ended and custody had been restored before the appellate process was ever initiated. Thus, it was not "firmly established" that Pennsylvania courts lacked the discretion to hear an appeal first filed after custody had been restored. Under the *Galloway* rationale a court would have the discretion to hear an appeal filed by such a defendant because the defendant would be in custody during the entire pendency of his appeal and subject to the enforcement of any order entered as a result thereof.... Therefore, the state courts in this case did not rely on an "adequate" procedural rule to deny petitioner a review of his appeal on the merits.

Doctor, 96 F.3d at 685-86.[5]

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[5]Since *Passaro*, Pennsylvania's fugitive waiver rule has undergone several changes. Although not directly relevant to the issue whether the rule applied here was firmly established in 1984, familiarity with these changes may make the *Kindler* decisions more comprehensible. They also show that the rule applied here was extant only during a brief window in the late 1980s and early 1990s. While the Third Circuit's ruling is clearly correct, there is also no need for this

C. **The State Court Procedural Ruling in this Case.**

As stated above, proper application of the adequate state ground doctrine requires identification of: (1) the rule applied by the state court; and (2) the time of the state court default.

1. On direct appeal, the Pennsylvania Supreme Court noted it had previously established a "general rule" that "defendants who are fugitives from justice *during the appellate process* have no right to any appellate review, even though they have been recaptured and returned to the custody of Pennsylvania." App. 82 (citing *Passaro*). The Pennsylvania Supreme Court, however, made clear that this *Passaro* rule *did not apply to Petitioner*, because he had *not* escaped during the pendency of the appeal:

> Here, however, Appellant's fugitive status did *not* take place *during the pendency of an appeal before us*. Rather, it took place while the trial court was considering Appellant's post-verdict motions and the question becomes whether the trial court

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Court to grant certiorari to review the Third Circuit's application of established procedural default principles to a rarely used rule that no longer exists.

As *Doctor* noted, the application of *Passaro* to a person who escapes during trial court proceedings but is returned to custody prior to direct appeal remained an open question for some time after *Passaro* was decided. In *Commonwealth v. Luckenbaugh*, 550 A.2d 1317 (Pa. 1988) (per curiam), the Court first applied *Passaro* to that situation. *See Commonwealth v. Jones*, 564 A.2d 983, 985-87 (Pa. Super. 1989) (en banc) (*Luckenbaugh* effectively overruled *Galloway*, applying *Passaro* for the first time to a defendant in these circumstances). In *Commonwealth v. Jones*, 610 A.2d 439, 441 (Pa. 1992), the Pennsylvania Supreme Court confirmed this reading of *Luckenbaugh*, holding that escape at any time post-trial is an absolute and irrevocable forfeiture of the right to appeal. In *Commonwealth v. Huff*, 658 A.2d 1340, 1341-42 (Pa. 1995), the Court retreated from this absolute forfeiture rule, finding no irrevocable forfeiture where the defendant escaped and was recaptured prior to sentencing, and the trial court exercised its discretion to consider the defendant's post-verdict motions. In *Interest of J.J.*, 656 A.2d 1355 (Pa. 1995), the Court held in a juvenile case that an appellate court has the discretion to consider an appeal if the defendant has been returned to custody, even if the defendant escaped during the appellate process. As the Court noted in *Commonwealth v. Deemer*, 705 A.2d 827, 829 n.2 (Pa. 1997), *Huff* and *J.J.* effectively overruled the absolute forfeiture rule of *Jones*. In *Deemer*, the Court completed that process, explicitly rejecting *Jones*' "absolute ... forfeiture" rule, and allowing a defendant to pursue an appeal as long as his time for doing so had not expired during the time he was a fugitive. *Deemer*, 705 A.2d at 829. The *Kindler* direct appeal was decided during the brief ascendency of the *Jones* absolute forfeiture rule.

has authority to dismiss such motions as a response to an Appellant's flight.

App. 83.

After reviewing related federal decisions, the Pennsylvania Supreme Court fashioned the following rule for this situation:

> [T]rial courts, when faced with a defendant in fugitive status, ... have every right to fashion an appropriate response which can include the dismissal of pending post-verdict motions. Our review of that action is limited to determining whether the flight has a connection with the court's ability to dispose the defendant's case and whether the sanction imposed in response to the flight is reasonable under the circumstances.

App. 84. Applying that *new* rule, the Pennsylvania Supreme Court found that the trial court had been justified in dismissing Petitioner's post-verdict motions. App. 84-87. Because, under the trial court's bar ruling, Petitioner had failed to "preserve[]" any "allegations of error," the Pennsylvania Supreme Court limited its appellate review to the automatic review mandated by the capital sentencing statute. App. 85-87 and n.4 (citing and quoting 42 Pa. C.S. § 9711(h)). *See also* App. 77-78 n.13 (on post-conviction appeal, Pennsylvania Supreme Court describes the rule applied on direct appeal as one of fugitive forfeiture).

2. As stated above, the "time of the state court procedural default" is when Petitioner took the action that resulted in a state court bar against his claims – *i.e.*, *when he escaped* on *September 19, 1984*. As the Third Circuit explained here and in *Doctor*, the "time of the state court procedural default" under these circumstances is the time of the escape. App. 21-22; *Doctor*, 96 F.3d at 684 (the relevant date for determining "whether the rule was firmly established and regularly applied, [was] *not* in *1993* when the Superior Court relied upon it [to bar the claims], but rather as of the date of the waiver that allegedly occurred *when Doctor escaped in 1986*."); *see also* n.4, *supra*.

D. The Third Circuit Correctly Found that the Procedural Bar Ruling Was Not Adequate to Preclude Federal Habeas Review of the Merits.

As the Third Circuit made clear, its analysis of the procedural default issue in *Kindler* was "controlled by our analysis in *Doctor*." App. 21. The more extensive analysis of the issue in *Doctor* is therefore critical to any accurate understanding of *Kindler*.[7]

As discussed in Part B, *supra*, in *Doctor* the Third Circuit conducted a thorough analysis of Pennsylvania's decisions in the fugitive forfeiture area. Based on that review, the Third Circuit determined that Pennsylvania had applied three different rules.

The first, or *Galloway* rule, allowed a former fugitive's appeal to be heard as long as he was returned to custody before the appeal was dismissed. In *Galloway* itself, the Pennsylvania Supreme Court "held that there was *no basis* to dismiss the defendant's appeal because he was in custody when the case was actually argued and would therefore be subject to the jurisdiction of the court and thus responsive to any judgment entered." *Doctor*, 96 F.3d at 685. Following *Galloway*, Pennsylvania courts had and frequently exercised the "discretion to hear a properly filed appeal as long as the criminal defendant had returned to the jurisdiction before the appeal was dismissed." *Id.* (citing cases).

The second, or *Passaro* rule, explicitly stated that this discretion to hear an appeal was eliminated if the appeal was actually dismissed before the fugitive was returned to custody – in that situation, the escape represented an *absolute forfeiture* of the right to appeal. Importantly, however, under *Passaro* the *Galloway* rule still applied if the fugitive was returned to custody before the appeal was dismissed. As *Doctor* explained,

Pennsylvania's fugitive forfeiture rule after Passaro can [be] described as follows:

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[7]Tellingly, the Commonwealth ignores *Doctor*, aside from a citation with a parenthetical in a footnote. PWC at 10 n.3.

> if the defendant is returned to custody while his appeal is pending, an appellate court has the discretion to hear the appeal, but if the defendant is returned to custody after the appeal is dismissed an appellate court lacks the discretion to reinstate and hear the appeal.

Doctor, 96 F.3d at 685.

The third, or *Luckenbaugh* rule, extended the "*Passaro* forfeiture analysis ... to a defendant who escaped and returned to custody during the pendency of his appeal." *Doctor*, 96 F.3d at 686, *citing Commonwealth v. Luckenbaugh*, 520 Pa. 75, 550 A.2d 1317 (1988).

Doctor fled in 1986, *Doctor*, 96 F.3d at 678, while the *Passaro* rule was extant. He was recaptured in 1992, and sentenced. He then attempted to appeal his conviction, but the appeal was dismissed on the basis of the (*Luckenbaugh*) fugitive forfeiture rule. *Id.* As the Third Circuit explained, the procedural bar rule was inadequate, *not* because it involved an exercise of discretion, but because Pennsylvania had *changed* from the *Galloway/Passaro* rule in which appeals in that posture were frequently allowed, to the *Luckenbaugh* absolute forfeiture rule, and retroactively applied that absolute forfeiture rule to dismiss the appeal:

> [A]t the time of [Doctor's] escape, ... Pennsylvania law afforded appellate courts different degrees of discretion depending on the posture of the appeal upon a former fugitive's return to custody. Pennsylvania law had never confronted the situation that arises in the instant case where petitioner's flight had ended and custody had been restored before the appellate process was ever initiated. Thus, it was not "firmly established" that Pennsylvania courts lacked the discretion to hear an appeal first filed after custody had been restored. Under the *Galloway* rationale a court would have the discretion to hear an appeal filed by such a defendant because the defendant would be in custody during the entire pendency of his appeal and subject to the enforcement of any order entered as a result thereof. Furthermore, ... it was unclear, until the Pennsylvania Supreme Court's decision in *Commonwealth v. Luckenbaugh*, 520 Pa. 75, 550 A.2d 1317 (1988), whether the *Passaro* forfeiture analysis even applied to a defendant who escaped and returned to custody during the pendency of his appeal. Therefore, the state courts in this case did not rely on an "adequate" procedural rule to deny petitioner a review of his appeal on the merits.

Doctor, 96 F.3d at 685-86.

The procedural history of *Kindler* is almost identical to *Doctor*. Mr. Kindler escaped from custody in 1984, while *Galloway/Passaro* was extant. Pending post-verdict motions were dismissed. After he was returned to the jurisdiction in 1991, he was sentenced and attempted to appeal. The Pennsylvania Supreme Court extended the *Luckenbaugh* rule to apply to this situation and dismissed the appeal on the basis of the fugitive forfeiture rule. App. 82-87; *see* App. 77-78 n.13.[8]

As the Third Circuit explained, this retroactive extension of *Luckenbaugh* was not adequate to preclude federal habeas review. Critically, because the *Galloway* jurisdictional rule applied at the time of the escape, the absolute fugitive forfeiture rule was inadequate:

> *Galloway* ... underscores a critical distinction between dismissed post-verdict motions and a dismissed final appeal. That distinction arises from the fact that after an appeal is dismissed, a court no longer retains jurisdiction. However, appellate courts can exercise jurisdiction after post-verdict motions are dismissed, and they therefore can exercise discretion to hear the claims of defendant's appeal.... When Kindler escaped in 1984, *Galloway* had not been overruled. Accordingly, the state trial court still had discretion to reinstate his post-verdict motions. Accordingly, we conclude that, under *Doctor*, Pennsylvania's fugitive waiver law did not preclude the district court from reviewing the merits of the claims raised in Kindler's habeas petition.

App. 23.

The Third Circuit's ruling is a classic application of this Court's procedural default law.

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[8]Alternatively, the Pennsylvania Supreme Court's decision could be read not as an extension of *Luckenbaugh*, but as a completely *new* rule – applicable to an escape while the proceedings are in the trial court – that permitted the trial court to "fashion an appropriate response" to the escape, including "dismissal of pending post-verdict motions," and limited review of the trial court's ruling "to determining whether the flight has a connection with the court's ability to dispose of the case and whether the sanction imposed in response to the flight is reasonable under the circumstances." App. 84. Such a rule was not even remotely in existence in 1984, and therefore clearly was not "firmly established" at the time of the default. Whether the state court's ruling is viewed as an extension of *Luckenbaugh* or a brand new rule, it is inconsistent with the jurisdictional rationale of *Galloway* and *Passaro* – that the appeal could proceed as long as the defendant was returned to the jurisdiction before his appeal was dismissed.

After the alleged default, Pennsylvania changed its law regarding appeals by fugitives from one of discretion – frequently exercised to *allow* such appeals – to an absolute fugitive forfeiture rule. Pennsylvania then applied its *new* fugitive forfeiture rule as the basis for dismissing Mr. Kindler's appeal. Because that new fugitive forfeiture rule was not in existence – much less firmly established and consistently applied – at the time of the default, it was not adequate to preclude federal habeas review. That is simply black letter law.[9]

E. The Commonwealth's Arguments Are Erroneous.

1. The Commonwealth's primary argument for granting certiorari misstates the Third Circuit's holding in *Kindler* and ignores the controlling precedent of *Doctor*, on which *Kindler* expressly relied.

According to the Commonwealth, in *Kindler* the Third Circuit "held squarely that a state court's power to exercise discretion in applying a rule of procedure renders that rule inadequate, *per se*, to support the state court judgment." PWC at 7. As explained above, nowhere in *Kindler* did the Third Circuit hold (squarely or otherwise) that a rule involving the exercise of discretion is *per se* inadequate. To the contrary, citing longstanding Third Circuit precedent, *Kindler* expressly stated the opposite: "A procedural rule that is consistently applied in the vast majority

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[9]*See, e.g.*, *Ford v. Georgia*, 498 U.S. at 424 (state court's retroactive application of a new procedural rule "does not even remotely satisfy the requirement" that a procedural bar rule be "'firmly established and regularly followed' by the time as of which it is to be applied"); *Terrell v. Morris*, 493 U.S. at 2 (per curiam) (reasoning petitioner "could not have known that he would default his... claim" because state court relied upon a rule that postdated his appeal); *Johnson v. Mississippi*, 486 U.S. at 587-89 (state court's ruling that claim was barred because not raised on direct appeal was inadequate, where court had previously ruled that such claims should be raised in collateral proceedings); *James v. Kentucky*, 466 U.S. at 348-49 (state's inconsistently applied rule was "not the sort of firmly established and regularly followed state practice that can prevent implementation of federal constitutional rights"); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958) ("Novelty in [state court] procedural requirements cannot be permitted to thwart [federal court] review.").

of cases is adequate to bar federal habeas review even if state courts are willing to occasionally overlook it and review the merits of a claim for relief where the rule would otherwise apply." App. 21 (citing *Neely v. Zimmerman*, 858 F.2d 144, 148 (3d Cir. 1988)).

The Commonwealth attempts to support its description of *Kindler*'s holding by quoting a passage out of context and removing the passage's citation to *Doctor*. *Compare* PWC at 7-8, *quoting* App. 22 (without citation to *Doctor*), *with* App. 22 (citing *Doctor*, 96 F.3d at 686). Properly read in context, *Kindler* first explained that because the Pennsylvania courts were applying the (*Galloway*) discretionary rule when Doctor escaped in 1986, but had changed to the (*Luckenbaugh*) forfeiture rule at the time of Doctor's appeal, "the fugitive forfeiture rule was not 'firmly established' and therefore was not an ... adequate procedural rule sufficient to bar review of the merits ... in federal court." App. 22. The Third Circuit then rejected the Commonwealth's attempt to distinguish *Doctor*, ruling that because "*Galloway* had not been overruled" when Kindler escaped in 1984, "the state trial court still had discretion to reinstate his post-verdict motions," App. 23, and therefore, again, the fugitive forfeiture rule was not "firmly established" at the time of Mr. Kindler's appeal.

When properly understood, the Commonwealth's entire argument for granting certiorari is a straw man. The Third Circuit *did not hold* that state procedural rules involving the use of discretion are *per se* inadequate to bar federal court review of the merits. Rather, it held that when a state court rule *changes* from one of discretion (frequently exercised in the defendant's favor) to an absolute bar, and does so *after* the alleged default, the absolute bar rule is inadequate.

2. Having set up a straw man "holding" erroneously attributed to the Third Circuit – that a state rule involving the exercise of discretion is *per se* inadequate – the Commonwealth

proceeds to argue that there is a conflict between the Circuits and even within the Third Circuit concerning the role of discretion in adequacy analysis. PWC at 10-11 & n.4. But this "conflict" is as evanescent as the supposed "holding" of *Kindler*.

a. The Commonwealth claims *Campbell v. Burris*, 515 F.3d 172 (3d Cir. 2008), "say[s] just the opposite" of *Doctor* and *Kindler*. PWC at 11. Actually, in *Campbell* the Third Circuit cited *Doctor* with approval, explaining in a parenthetical that in *Doctor*, "because the rule on its face provided little or no guidance regarding the application of the rule to the present facts," the Court had examined Pennsylvania decisions "to determine whether the rule, at the time of its application to petitioner, was 'firmly established and regularly applied.'" *Campbell*, 515 F.3d at 179 (discussing *Doctor*, 96 F.3d at 684-85). Far from recognizing a conflict between its holding and that of *Doctor* (upon which the *Kindler* panel relied) the *Campbell* panel *explicitly endorsed* the approach of *Doctor* (and thus of *Kindler*).[10]

In *Campbell*, Judge Stapleton further explained the approach taken by the Third Circuit in *Doctor*, *Kindler* and *Campbell*. As all three decisions noted, to be adequate, state court rules should be applied evenhandedly, allowing for occasional exceptions. *See Doctor*, 96 F.3d at 684 (citing *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982), and *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989)); *Campbell*, 515 F.3d at 181 (citing cases); App. 21 (citing *Neely v. Zimmerman*, 858 F.2d 144, 148 (3d Cir. 1988)). *Campbell* then described how to analyze whether a state rule involving the exercise of discretion is adequate:

> The issue is not whether the state procedural default rule leaves room for the exercise of some judicial discretion – almost all do. Rather, the issue is whether, at the relevant point in time, the judicial discretion contemplated by the state rule

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[10]Given that Judge Stapleton was the author of *Campbell* (decided February 14, 2008), and was a member of the unanimous *Kindler* panel (decided September 3, 2008) it would be passing strange if *Campbell* actually said "just the opposite" of *Kindler*.

is being exercised in a manner that lets people know when they are at risk of default and treats similarly-situated people in the same manner.

Campbell, 515 F.3d at 181.

Campbell and *Kindler* followed the same approach on the adequacy question. The only difference between them is that the rule involved in *Campbell* was firmly established and consistently applied, whereas the rule in *Kindler* was not.[11]

b. The Commonwealth's argument that some Circuits are willy nilly treating

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[11]In Mr. Kindler's case, Pennsylvania manifestly did *not* "treat[] similarly-situated people in the same manner." *Campbell, supra*. Reginald Lewis and Mr. Kindler escaped *at the same time, see* NT 10/23/84 at 17-18, 38, 41-43, 54, but the Pennsylvania Supreme Court did not apply the same rule to them. Mr. Lewis escaped after sentencing, while his appeal was pending. Nevertheless, after requesting briefing on the issue of whether the appeal should be quashed, the court declined to address it, noting that it was a "*question of first impression*" that would be better addressed "in a case wherein the appellant's escape *actually results in a disruption of the appellate process*." *Commonwealth v. Lewis*, 567 A.2d 1376, 1378 n.1 (Pa. 1989). The court then proceeded to merits review of Mr. Lewis' direct appeal claims, and later reviewed his state post-conviction claims. *Commonwealth v. Lewis*, 743 A.2d 907 (Pa. 2000). Mr. Kindler did not receive merits review of any of his claims. This disparate treatment would render the bar here inadequate even apart from the other considerations discussed herein. *See Romano v. Gibson*, 239 F.3d 1156, 1169-70 (10th Cir. 2001) (no adequate state ground where state court barred petitioner's claims but addressed merits of claims raised by petitioner's co-defendant in separate appeal, where both petitioner and co-defendant violated the same procedural rule).

Moreover, in 1986, the Pennsylvania Supreme Court allowed the direct appeal of Nicholas Yarris, another death sentenced prisoner, to go forward despite the fact that Mr. Yarris had escaped *while his appeal was pending*. In 1983, after Mr. Yarris' post-verdict motions were denied and he was formally sentenced to death, he filed his direct appeal to the Pennsylvania Supreme Court. *See Commonwealth v. Yarris*, 731 A.2d 581, 583 (Pa. 1999) (describing procedural history). New counsel, appointed for the appeal, asked the Pennsylvania Supreme Court to remand for an evidentiary hearing as part of the appeal. *Id.* On March 15, 1984, the Pennsylvania Supreme Court remanded for a hearing, which was scheduled for February 20, 1985. *Id.* at 584. Mr. Yarris *escaped while being transported to the hearing*. *Id.* While he was at large, the lower court returned the record to the Pennsylvania Supreme Court "so that consideration of [his] direct appeal could proceed." *Id.* The Commonwealth then moved to quash the appeal. The Pennsylvania Supreme Court denied the motion to quash, and went on to decide the appeal *on the merits*. *Id.*; *see Commonwealth v. Yarris*, 518 A.2d 261 (Pa. 1986) (denying motion to quash); *Commonwealth v. Yarris*, 549 A.2d 513 (Pa. 1988) (deciding merits of direct appeal). The Pennsylvania Supreme Court *declined to apply* any fugitive waiver rule, and decided Mr. Yarris' appeal on the merits.

any state court exercise of discretion as an inadequate procedural rule similarly evaporates upon review of the decisions cited by the Commonwealth in PWC at 10 n.3.

i. The Fifth Circuit decisions in *Fearance v. Scott*, 56 F.3d 633 (5th Cir. 1995), and *Lowe v. Scott*, 48 F.3d 873 (5th Cir. 1995), on which *Fearance* relied, are not about "discretion." In *Lowe*, the Fifth Circuit ruled that because Texas had not consistently or regularly applied an abuse of the writ bar to successive petitions, the bar was not adequate to preclude habeas review under decisions such as *Johnson v. Mississippi*, 486 U.S. at 587. *Lowe*, 48 F.3d at 876. In 1994, Texas announced that it would henceforth apply the abuse of the writ bar. Petitioners who violated the rule after Texas changed its application faced an adequate bar, because it was now being consistently and regularly applied. *Fearance*, 56 F.3d at 642.

ii. The Sixth Circuit's decision in *Deitz v. Money*, 391 F.3d 804 (6th Cir. 2004), also does not generate any sort of conflict. There, the defendant had filed in state court to reopen his direct appeal or allow a delayed appeal, alleging that trial and appellate counsel had failed to perfect the appeal despite petitioner's requests. The Ohio courts first granted leave to reopen the appeal, then withdrew leave and denied the motion for a delayed appeal, citing defendant's failure to make the required showing, despite the fact that he had "describe[d] in considerable detail his claim of ineffective assistance of counsel ...." *Id.* at 811. In *Deitz*, the Sixth Circuit found that Ohio's rules were not consistently applied, distinguishing *Hutchison v. Bell*, 303 F.3d 720 (6th Cir. 2002) (cited in PWC at 11 n.4) on the ground that the Ohio rule involved the exercise of "unfettered" discretion, and relying on the fact that similarly situated defendants had been granted leave to reopen an appeal. *Id.*[12] Again, the distinguishing factor was not

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[12]The Commonwealth also cites *McCalvin v. Yukins*, 444 F.3d 713, 724 (6th Cir. 2006). PWC at 10 n.3. The cited passage, however, is from Judge Cole's dissenting opinion, not the majority. The dissenting opinion of a single judge does not support the Commonwealth's

"discretion," but consistent application of the rule.

iii. Similarly, the Ninth Circuit decisions cited by the Commonwealth (*McKenna v. McDaniel*, 65 F.3d 1483 (9th Cir. 1995), and *Valerio v. Crawford*, 306 F.3d 742 (9th Cir. 2002)), do not rely solely on the fact that the state courts had the discretion to overlook a procedural rule, but on the fact that the courts so repeatedly *exercised* their discretion to allow successive petitions that a bar was not "consistently applied." *See Valerio*, 306 F.3d at 776-78 (discussing prior Nevada decisions and prior Ninth Circuit decisions, including *McKenna*). As the Ninth Circuit concluded, "The number and the variety of cases in which the Nevada Supreme Court addressed constitutional claims on the merits in capital cases, despite unexcused failures to present these claims in earlier proceedings, lead us to conclude that the court *exercised* a general discretionary power to address them." *Id.* at 778.

iv. Finally, the Commonwealth cites a brief unpublished Tenth Circuit opinion, *Biehle v. Kerby*, 25 F.3d 1055, 1994 WL 175682 (10th Cir. 1994) (Table, Text in WESTLAW). Again, *Biehle* noted the discretionary nature of the rule in question, *and* the fact that New Mexico courts had *frequently* overlooked violations of the technical rule in question, before concluding that the rule in question "is not regularly and evenhandedly applied and is, therefore, inadequate." *Biehle*, 1994 WL 75682 at *3.[13]

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argument.

[13]The decisions the Commonwealth relies upon to support what it terms the "opposite" proposition, *see* PWC at 11 & n.4, may all easily be harmonized with the above decisions, to the extent they are relevant at all. *Hutchison*, 303 F.3d at 738, and *Scott v. Mitchell*, 209 F.3d 854, 868-69 (6th Cir. 2000), are simply decisions in which the Sixth Circuit found that the state courts had a consistently enforced procedural rule, as opposed to the exercise of "unfettered discretion," *Hutchison*, *supra*, while allowing for "isolated examples of discretion." *Scott*, *supra*. Again, *Prihoda v. McCaughtry*, 910 F.2d 1379, 1384-85 (7th Cir. 1990), turned on the consistency of the state courts' application of their rule. *Rogers-Bey v. Lane*, 896 F.2d 279 (7th Cir. 1990), which has been abrogated by *Coleman v. Thompson*, 501 U.S. 722 (1991), *see Willis v. Aiken*, 8

Neither in *Kindler* nor in the other decisions cited by the Commonwealth have the lower federal courts held that any rule involving the use of discretion is *per se* inadequate. Rather, those courts have properly reviewed the manner in which that discretion is exercised. In some cases – like *Campbell*, which the Commonwealth presents as an appropriate decision – the rule is consistently enforced, with occasional acts of grace. Such rules (assuming they were firmly established at the time of the default) will be considered adequate. In other cases – like *Kindler* and *Doctor*, which the Commonwealth criticizes – the rule either was not firmly established at the time of the default or was only rarely enforced. Such rules are not adequate to bar federal review of the merits. There is no significant controversy about any of this. The Commonwealth simply does not like the result in *Kindler*.

3. The Commonwealth argues that this case is a particularly good one for taking up the question of the adequacy of discretionary rules, because this case involves an escape by a death sentenced prisoner. PWC at 14-15. However, the view asserted by the Commonwe that an escape should necessarily result in a forfeiture, particularly in a capital case – has not been the view taken by the Pennsylvania courts. As discussed in Part B, *supra*, the Pennsylvania courts frequently allowed appeals by recaptured fugitives, except for a brief window in the late 1980s and early 1990s. And this is particularly true in capital cases. Moreover, given that what

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F.3d 556 (7th Cir. 1993), is simply irrelevant. In *Rogers-Bey*, the state court had both applied a waiver rule and reviewed the petitioner's claim for plain error. The majority ruled that the state court decision did not clearly rely on a procedural bar. *Rogers-Bey*, 896 F.2d at 281-82. In his concurrence, Judge Manion disagreed with this aspect of the majority's analysis, *id.* at 284 (Manion, J., concurring), but neither the majority nor Judge Manion addressed the adequacy or consistent application of the state's rule. Finally, in *Murray v. Hvass*, 269 F.3d 896 (8th Cir. 2001), the Eighth Circuit, like the Sixth Circuit in *Hutchison* and *Scott*, simply found that the state courts had consistently applied their rule, despite occasional exercises of discretion to allow merits review.

is at issue here is a rarely used rule that has never been consistently applied, this case is decidedly not a good vehicle for reviewing a long established and rarely questioned body of law.

4. The Commonwealth argues that Mr. Kindler got a "windfall" from his flight because the Third Circuit granted him relief under *Mills v. Maryland*, 486 U.S. 367 (1988), which was decided after his trial, and because it also relied on recent decisions of this Court in granting Mr. Kindler relief on an ineffective assistance of counsel claim. PWC at 16 and 16-17 n.7. The Commonwealth errs.

The Commonwealth asserts that if Mr. Kindler had not escaped, "his direct appeal would likely have been over, and the judgment final, before *Mills* was even decided." PWC at 16. This is pure speculation – no such retrospective prediction is feasible. For example, the conviction of a death row inmate who was sentenced in 1983, and who *did not escape*, did not become final until 1989, *see Commonwealth v. Hughes*, 555 A.2d 1264 (Pa. 1989); the conviction of a death row prisoner who was sentenced in 1985, and who *did not escape*, did not become final until 1995, *see Commonwealth v. Jones*, 651 A.2d 1101 (Pa. 1994), *cert. denied*, 516 U.S. 835 (1995). Reginald Lewis - another capital inmate who was sentenced in June 1984 and escaped with Petitioner but soon recaptured – had his direct appeal denied on the merits on December 22, 1989. *See Commonwealth v. Lewis*, 567 A.2d 1376 (Pa. 1989).

The Commonwealth piles speculative mountains on top of each other by suggesting that, had Mr. Kindler's ineffective assistance claim been reviewed prior to this Court's decisions in *Rompilla v. Beard*, 545 U.S. 374 (2005), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2000), his claim would have been denied. None of those decisions, however, altered analysis of ineffective assistance claims under *Strickland v. Washington*, 466 U.S. 668 (1984). Each decision found that the state court decisions being reviewed had

unreasonably applied *Strickland*. *See Rompilla*, 545 U.S. at 389 (state court's conclusion that counsel's investigation was adequate was an "objectively unreasonable" application of *Strickland*); *Wiggins*, 539 U.S. at 522 (noting that this Court "made no new law" in *Williams*); *id.* at 527 (the "Maryland Court of Appeals' application of *Strickland*'s governing legal principles was objectively unreasonable"); *Williams*, 529 U.S. at 395-98 (state court's decision was contrary to and an unreasonable application of *Strickland*). The argument that Mr. Kindler received a "windfall" because a state court reviewing his ineffective assistance claim on the merits would not have reasonably applied *Strickland* is remarkably odd.

5. The Commonwealth attempts a strained analogy to *Goeke v. Branch*, 514 U.S. 115 (1995) (per curiam). PWC at 17-19.[14] In *Goeke*, the habeas petitioner alleged that dismissal of an appeal on the basis of a Missouri fugitive forfeiture rule (which was apparently firmly established and consistently applied) violated substantive due process. This Court held that the due process claim was barred by the nonretroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989). *Goeke*, 514 U.S. at 119-21.

The distinctions between the *Teague* ruling in *Goeke* and the adequacy issue in this case are obvious. *Teague* is of course a rule governing substantive claims for relief, while the adequate state ground doctrine is merely one aspect of procedural default law. Moreover, a ruling that fugitive forfeiture rules violate substantive due process would sweep aside all such rules (including ones that are firmly established and consistently applied), while the decision here simply allowed federal review of Mr. Kindler's substantive claims, given that the fugitive forfeiture rule at issue was neither firmly established nor consistently applied. *Goeke* is

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[14]This argument is so weak that in some 280 pages of Third Circuit briefing, the Commonwealth never cited *Goeke*. If not waived, the argument is meritless.

irrelevant.

6. Finally, the Commonwealth attempts another strained analogy, this time to *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), and *Allen v. Siebert*, 128 S. Ct. 2 (2007).[15] *Pace* and *Allen* held that when a state court finds a state petition to have been untimely, the state petition was not "properly filed," and therefore does not toll the running of the AEDPA statute of limitations under 28 U.S.C. § 2244(d)(2). *Pace*, 544 U.S. at 417; *Allen*, 128 S. Ct. at 4.

While some Circuit Courts may have seen an analogy between the "properly filed" requirement and the adequate state ground doctrine, this Court has made clear that the principles and precedents that apply to the issues of statutory tolling and procedural default are markedly different. In *Artuz v. Bennett*, 531 U.S. 4 (2000), this Court noted that the "question whether an application has been 'properly filed' [under § 2244(d)(2)] is quite separate from the question whether the claims *contained in the application* are meritorious and free of procedural bar," *id.* at 9 (emphasis original), and held that a state petition containing procedurally barred claims tolls the statute. *Id.* at 8-10.

Artuz puts to rest any notion of a correspondence between construction of § 2244(d)(2) and the adequate state grounds doctrine. Indeed, the adequate state ground doctrine long predates the AEDPA. It derives from and applies to this Court's certiorari review as well as to federal habeas review. *See Lee v. Kemna*, 534 U.S. 362, 375 (2002) ("We first developed the independent and adequate state ground doctrine in cases on direct review from the state courts, and later applied it as well 'in deciding whether federal district courts should address the claims of state prisoners in habeas corpus actions'") (quoting *Coleman v. Thompson*, 501 U.S. 722, 729

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[15] As with *Goeke*, the Commonwealth never cited *Pace* in its extensive Third Circuit briefs. Although *Allen* was only a straightforward application of *Pace*, the Commonwealth cited *Allen* post-argument as "supplemental" authority.

(1991)). It would be odd indeed for § 2244(d)(2) analysis to control this Court's exercise of its certiorari jurisdiction, and equally odd to have one adequate state ground doctrine for certiorari and another one for habeas. The Commonwealth's strained argument is without merit.

II. THE THIRD CIRCUIT'S RULING IS SUPPORTED BY AN ALTERNATIVE GROUND NOT REACHED BY THAT COURT – THAT THERE WAS NO ADEQUATE STATE GROUND BASED ON PENNSYLVANIA'S CAPITAL CASE RELAXED WAIVER DOCTRINE.

In the Third Circuit, Mr. Kindler argued a separate reason why the rule applied by the state courts was not "adequate" – the application of Pennsylvania's capital case relaxed waiver rule. Because the Third Circuit found that the rule was not adequate under *Doctor*, there was no need for it to reach the relaxed waiver issue.[16] The operation of the capital case relaxed waiver rule, however, fully supports the Third Circuit's decision. Because of the different treatment historically afforded waiver in Pennsylvania capital cases, there is no adequate state ground here even aside from *Doctor*.

The Pennsylvania Supreme Court first articulated its capital case relaxed waiver rule in 1978, when it proclaimed that an "overwhelming public interest" in preventing unconstitutional executions precluded ordinary application of waiver rules in Pennsylvania capital cases. *Commonwealth v. McKenna*, 383 A.2d 174, 181 (Pa. 1978). The Pennsylvania Supreme Court explained that it would not allow waiver rules to "be exalted to a position so lofty as to require this Court to blind itself to the real issue – the propriety of allowing the state to conduct an illegal execution of a citizen." *Id.* at 180-81. It concluded that it had a "duty to transcend procedural

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[16] *Galloway*, *Passaro* and the other fugitive waiver or forfeiture decisions discussed in *Doctor* and *Kindler* all involved non-capital cases.

rules" in capital cases, and to address waived claims on their merits. *Id.*[17]

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[17] After *McKenna*, the Pennsylvania Supreme Court repeatedly applied this capital case relaxed waiver rule, held that *procedural bars would not be applied in Pennsylvania capital cases*, and indicated that it would review all claims for relief raised in death penalty proceedings. *See, e.g.*, *Commonwealth v. Morales*, 701 A.2d 516, 520 n.13 (Pa. 1997) ("this Court's practice has been to address all waived issues" in death penalty cases); *Commonwealth v. Abu-Jamal*, 720 A.2d 79, 88 n.9 (Pa. 1998) (noting "this court's tradition of entertaining all claims raised in a capital case, whether on direct appeal or collateral attack, irrespective of waiver"); *Commonwealth v. Jermyn*, 709 A.2d 849, 856 n.20 (Pa. 1998) ("this court has addressed all issues arising in a death penalty case, irrespective of a finding of waiver"); *Commonwealth v. Banks*, 656 A.2d 467, 470 n.7 (Pa. 1995) (addressing waived claims because "it is this Court's practice to address all issues arising in a death penalty case irrespective of a finding of waiver"); *Commonwealth v. Morris*, 684 A.2d 1037, 1042 n.11 (Pa. 1996) (same); *Commonwealth v. Travaglia*, 661 A.2d 352, 356 n.6 (Pa. 1995) ("it is this Court's practice to address all issues arising in a death penalty case, irrespective of a finding of waiver"); *Commonwealth v. Szuchon*, 693 A.2d 959, 962-64 (Pa. 1997) (same); *Commonwealth v. Christy*, 656 A.2d 877, 881 n.2, 885 n.14, 886 n.15 (Pa. 1995) (death penalty is "extraordinary circumstance" that trumps waiver rules); *Commonwealth v. Beck*, 560 A.2d 1370, 1374 (Pa. 1989) ("We ... relax the rule of waiver in capital punishment cases specifically in order to get to the truth."); *Commonwealth v. Brown*, 711 A.2d 444, 455-56 (Pa. 1998) ("This Court generally applies a relaxed waiver rule in capital cases because of the permanent, irrevocable nature of the death penalty."); *Commonwealth v. Spotz*, 716 A.2d 580, 585 n.5, 591 (Pa. 1998) (reviewing waived claim on merits because of "our practice to relax waiver rules in capital cases"); *Commonwealth v. Wharton*, 665 A.2d 458, 462 (Pa. 1995) (same); *Commonwealth v. Hill*, 666 A.2d 642, 648 (Pa. 1995) (same); *Commonwealth v. Williams*, 640 A.2d 1251, 1261 (Pa. 1994) (same); *Commonwealth v. Chester*, 587 A.2d 1367, 1382 n.9 (Pa. 1991) (same); *Commonwealth v. Nelson*, 523 A.2d 728, 736 (Pa. 1986) (same); *Commonwealth v. Pirela*, 507 A.2d 23, 27 n.2 (Pa. 1986) (same); *Commonwealth v. Frey*, 475 A.2d 700, 707 n.4 (Pa. 1984) (same); *Commonwealth v. Simmons*, 662 A.2d 621, 636 (Pa. 1995) (same); *Commonwealth v. Abu-Jamal*, 555 A.2d 846, 854 (Pa. 1989) (same); *Commonwealth v. Baker*, 511 A.2d 777, 790 n.10 (Pa. 1986) (same); *Commonwealth v. Walker*, 656 A.2d 90, 98-99 (Pa. 1995) (same); *Commonwealth v. Gibson*, 688 A.2d 1152, 1160-63 nn.13, 15, 19, 23 (Pa. 1997) (same); *Commonwealth v. Gibson*, 720 A.2d 473, 481 n.2 (Pa. 1998) (same); *Commonwealth v. Wayne*, 720 A.2d 456, 469 n.13 (Pa. 1998) (same); *Commonwealth v. Williams*, 720 A.2d 679, 684 n.12 (Pa. 1998) (same); *Commonwealth v. Clark*, 710 A.2d 31, 40 (Pa. 1998) (same); *Commonwealth v. Hall*, 701 A.2d 190, 200, 202 n.14, 207 n.17 (Pa. 1997) (same); *Commonwealth v. Washington*, 692 A.2d 1024, 1030 n.11 (Pa. 1997) (same); *Commonwealth v. Marinelli*, 690 A.2d 203, 214 n.19 (Pa. 1997) (same); *Commonwealth v. Gribble*, 703 A.2d 426, 436-37 (Pa. 1997) (same); *Commonwealth v. Elliott*, 700 A.2d 1243, 1252 n.21 (Pa. 1997) (same); *Commonwealth v. Speight*, 677 A.2d 317, 326 n.15 (Pa. 1996) (same); *Commonwealth v. Cook*, 676 A.2d 639, 649 n.26 (Pa. 1996) (same); *Commonwealth v. May*, 656 A.2d 1335, 1343 n.7, 1344 n.9 (Pa. 1995) (same); *Commonwealth v. Miller*, 664 A.2d 1310, 1320 n.17, 1322, 1323 n.22 (Pa. 1995) (same); *Commonwealth v. Johnson*, 668 A.2d 97, 102 n.12, 103 nn.14-15, 104 n.18, 106 n.20, 107 n.21 (Pa. 1995); *Commonwealth v. Dellart*, 650 A.2d 38, 48 (Pa. 1994) (same; granting relief on claim first raised on appeal from denial of post-

As Judge (now Justice) Alito explained in *Bronshtein v. Horn*, 404 F.3d 700 (3d Cir. 2005), *McKenna* thus "firmly established that a claim of constitutional error in a [Pennsylvania] capital case *would not be waived* by a failure to preserve it." *Id.* at 708 (quoting *Szuchon v. Lehman*, 273 F.3d 299, 326 (3d Cir. 2001)). This capital case relaxed waiver rule remained in effect until "[t]wenty years later," when "the state supreme court changed course" in *Commonwealth v. Albrecht*, 720 A.2d 693 (Pa. 1998), and began to apply ordinary waiver rules in capital post-conviction cases. *Bronshtein*, 404 F.3d at 709. Thus, at the time of the state court default here (the 1984 escape), the relaxed waiver rule was in full effect.[18] Because the relaxed waiver doctrine was "made broadly available" to capital defendants by the Pennsylvania Supreme Court, both "on direct appeal, [and] in the post-conviction context," *Commonwealth v. Ford*, 809 A.2d 325, 337 (Pa. 2002) (Saylor, J., concurring), the potential application of a fugitive waiver or forfeiture rule to a capital defendant was not "firmly established." Thus, the waiver rule applied here is not adequate.

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conviction relief); *Commonwealth v. Crispell*, 608 A.2d 18, 22 n.1 (Pa. 1992) (same); *Commonwealth v. Billa*, 555 A.2d 835, 842 (Pa. 1989) (same); *Commonwealth v. Harris*, 703 A.2d 441, 445 n.5, 446 n.7, 9 (Pa. 1997) (same); *Commonwealth v. Miles*, 681 A.2d 1295, 1301 n.8 (Pa. 1996) (same); *Commonwealth v. LaCava*, 666 A.2d 221, 228 n.8 (Pa. 1995) (same); *Commonwealth v. Paolello*, 665 A.2d 439, 453 n.11 (Pa. 1995) (same); *Commonwealth v. Yarris*, 549 A.2d 513, 521 (Pa. 1988) (same); *Commonwealth v. Carpenter*, 515 A.2d 531, 536 n.4, 538 n.8 (Pa. 1986) (same); *Commonwealth v. Holcomb*, 498 A.2d 833, 837 n.6 (Pa. 1985) (same); *Commonwealth v. Lesko*, 501 A.2d 200, 207 (Pa. 1985) (addressing merits of waived claim first raised in post-conviction); *Commonwealth v. Zettlemoyer*, 454 A.2d 937, 942 n.3, 955 n.19 (Pa. 1982) (declining to allow waiver in capital cases because of "final and irrevocable nature of the death penalty" and "for the reasons stated in" *McKenna*); *Commonwealth v. Stoyko*, 475 A.2d 714, 720-21 (Pa. 1984) (same).

[18] *Albrecht* only eliminated relaxed waiver in post-conviction cases. The Pennsylvania Supreme Court continued to apply relaxed waiver on direct appeal until 2003. *See Commonwealth v. Freeman*, 827 A.2d 385 (Pa. 2003) (abolishing relaxed waiver on direct appeal).

This is particularly true to the extent that the Pennsylvania Supreme Court relied on a new rule treating an escape during post-verdict proceedings as a waiver of the claims raised in those proceedings. *See* App. 85-86. Beginning with *Zettlemoyer*, and continuing until 2003, the Pennsylvania Supreme Court routinely reviewed the merits of claims on direct appeal in capital cases, even though the appellants technically waived those claims by failing to raise them in post-verdict (now post-sentence) motions.[19] Although in *Kindler*, on direct appeal, the Pennsylvania Supreme Court stated that Respondent's claims were waived because the trial court properly dismissed the post-verdict motions, under the relaxed waiver rule, he had a right to have his claims heard on appeal *even though they were not properly preserved on post-verdict motions*. Not until the decision here had the Pennsylvania Supreme Court ever hinted that this application of the relaxed waiver rule – consistently followed since *Zettlemoyer* – was not available to defendants who had post-verdict motions dismissed because they were fugitives.

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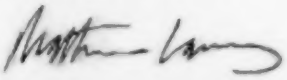
[19]*See, e.g.*, *Freeman*, 827 A.2d at 401 (prospectively abrogating use of relaxed waiver rule on direct appeal; observing that the "relaxed waiver practice has ... been routinely employed ... to reach claims that ... were not raised at all in the trial court"); *Commonwealth v. Pirela*, 507 A.2d 23, 27 n.2 (Pa. 1986) ("This is apparently the first stage of the proceedings at which appellant raises this argument. Because of the relaxed rule of waiver which we apply to cases involving imposition of the death penalty, we will review the claim") (citation omitted)); *Commonwealth v. Stoyko*, 475 A.2d 714, 720-21 (Pa. 1984) (same for penalty phase issues not preserved at trial or raised on appeal); *Commonwealth v. Zettlemoyer*, 454 A.2d 937, 955 n.19 (Pa. 1983) ("This issue was not raised in post-verdict motions and is, accordingly, waived. However, [in capital cases] we will not adhere strictly to our normal rules of waiver. ... Accordingly, significant issues perceived *sua sponte* by this Court, or raised by the parties, will be addressed and, if possible from the record, resolved").

CONCLUSION

For the reasons set forth herein, this Court should deny the Commonwealth's petition for writ of certiorari.

Respectfully submitted,



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REPLY BRIEF

Supreme Court, U.S.
FILED
MAY 8 - 2009
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No. 08-992

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY A. BEARD, et al.
Petitioners

v.

JOSEPH J. KINDLER,
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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Reasons for Granting the Petition

Contrary to respondent's cavil, this case squarely presents the question of whether state procedural rules are "inadequate" if the state court has discretion in applying them.

In the way of all briefs in opposition to certiorari, respondent labors to portray the issue presented as both complicated and unremarkable. He argues that the state procedural rule in question was a moving target that the state courts regularly altered and applied to unsuspecting (albeit fugitive) defendants. He maintains that the federal court of appeals refused to honor the rule not because it was discretionary, but because it was newly mandatory and therefore not "firmly established." He says that the problem of discretion is "a straw man."

Respondent's efforts disregard the language of the state and federal decisions in this very case. The Pennsylvania Supreme Court made very clear that it was applying an *abuse of discretion standard* to the trial court's dismissal of respondent's post-verdict motions. The Third Circuit court of appeals made very clear that the fugitive forfeiture rule it was reviewing was one of discretion, that the rule was *for that reason* not firmly established, and that the state ground was

as a result inadequate. That is why this case demonstrates the need to revisit the "firmly established/consistently applied" standard for implementing the adequate-state-grounds doctrine.

Here is what the state court said about the fugitive flight ruling that barred merits review of most of respondent's claims. On direct appeal, the court framed the issue this way: "Appellant argues that it was an *abuse of discretion* to dismiss his post-verdict motions." App. 82 (emphasis supplied). "[T]he question becomes whether the trial court *has authority* to dismiss such motions as a response to an Appellant's flight. The United States Supreme Court has recently reviewed its own case law which *permits* its appellate courts to dismiss." App. 83 (emphasis supplied).

Thus the state supreme court plainly understood the question to be whether the trial court had abused its discretion in dismissing – *not* whether it was bound to do so by some newly crafted rule of "absolute fugitive forfeiture." And the court answered that question by affirming that the trial court did indeed have such discretion: "[O]ur trial courts, when faced with a defendant in fugitive status, also have every *right* to fashion an appropriate response, which *can include* the dismissal of pending post-verdict motions. *Our review* of that action *is limited* to determining whether the flight has a connection with the court's ability to dispose the defendant's case and whether

the sanction imposed in response to the flight *is reasonable under the circumstances.*" App. 84.

These phrases – "abuse of discretion," "has authority," "permits," "right," "can include," "our review ... is limited," "is reasonable under the circumstances" – are simply not consistent with respondent's repeated representation that the state supreme court was imposing a new and "absolute" fugitive forfeiture rule. *See, e.g.*, Brief in Opp. at i, 11, 12, 13, 14. On the contrary, the court spoke in the classic language of discretion.

In doing so, the state supreme court in this case applied precisely the same approach to fugitive flight that had been taken by the intermediate state appellate court in the years preceding the escapes perpetrated by respondent himself, in 1984 and again in 1986.[1]

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[1] *See, e.g., Commonwealth v. Boyd*, 366 A.2d 934, 934-35 (Pa. Super. 1976) ("The sole question is whether or not the trial court acted properly in dismissing the post-trial motions and refusing to reinstate and reconsider them when appellant returned.... If he thereafter returns it is a matter of discretion of the court whether or not the circumstances justify a reinstatement of his post-trial motions or applications.... We find that the ... trial court did not abuse its discretion in refusing to consider the motions"); *Commonwealth v. Clark*, 446 A.2d 633, 634 (Pa. Super. 1982) ([W]hen appellant returns to the court's jurisdiction, this court may grant leave to re-file post-trial motions.... While it

(continued...)

Likewise in federal court. Here is what the court of appeals said about the fugitive flight rule that it found inadequate. Pennsylvania appellate courts "can *exercise discretion* to hear the claims of defendant's appeal.... When Kindler escaped in 1984, ... the state trial court *still had discretion* to reinstate his post-verdict motions. *Accordingly*, we conclude that, under *Doctor* [*v. Walters*, 96 F.3d 675 (3rd Cir. 1996)], Pennsylvania's fugitive waiver law did not preclude the district court from reviewing the merits of the claims raised in

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[1](...continued)
is within our discretion to remand for reinstatement, as did the [*Commonwealth v.*] *Galloway* [333 A.2d 741 (1975)] court, we are not constrained to do so. We conclude instead that the trial court did not abuse its discretion in declining to reinstate appellant's post-trial motions even after he was returned to the jurisdiction").

Respondent himself indirectly acknowledges that this was the state of Pennsylvania law at the time of respondent's escapes: "After *Galloway*, Pennsylvania's ... courts consistently recognized their discretion to hear a properly filed appeal as long as the criminal defendant had returned to the jurisdiction before the appeal was dismissed." Brief in Opp. at 7 (citations omitted). Respondent appears to believe, however, that the discretion to hear a fugitive's claims did not include the discretion *not* to hear the fugitive's claims. Of course that would be no kind of discretion at all.

Kindler's habeas petition." App. 23 (emphasis supplied).

Thus the court of appeals saw the applicable fugitive forfeiture rule exactly as did the state supreme court: as a matter within the discretion of the trial court. And it was exactly *because* of that discretion ("*Accordingly*, ... ") that the state bar could be ignored: it was not adequate to preclude federal merits review.

Respondent insists that the prior precedent on which the court of appeals relied – *Doctor v. Walters* – somehow transmogrifies the plain language quoted above. *Doctor*, he asserts, holds that Pennsylvania's fugitive waiver rule was recast into an automatic, absolute bar, which was inadequate only because it was applied retroactively, not because it was discretionary. Therefore, contends respondent, the decision in this case must rest on the same ground.

Respondent's understanding of Third Circuit precedent, however, simply is not shared by the Third Circuit itself. Contrary to respondent's invention, *see* Brief in Opp. at 15, there is not a word in the opinion below about any "change" in Pennsylvania's fugitive practice, not a word about any "shift" or "retroactive application" or new "absolute" bar.

Instead, this is what the court of appeals had to say about its prior opinion in *Doctor*: "On federal habeas review, the Commonwealth argued that the state courts' application of the fugitive waiver doctrine precluded federal habeas relief. We disagreed because the rule was not being consistently or strictly applied when Doctor escaped in 1986. *Id.* at 684-686. After surveying decisions of the Pennsylvania courts we concluded that Pennsylvania courts *had discretion* to hear an appeal filed by a fugitive who had been returned to custody before an appeal was initiated or dismissed. *Id.* at 686. *Accordingly*, the fugitive forfeiture rule was not 'firmly established' and *therefore* was not an independent and adequate procedural rule sufficient to bar review of a habeas petitioner in federal court." App. 21-22 (emphasis supplied).[2]

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[2]Nor is this the only time that the Third Circuit has characterized its *Doctor* decision in such terms. Indeed the court previously has used virtually identical language to describe *Doctor*: "[A]n examination of Pennsylvania cases established that when Doctor escaped, Pennsylvania courts recognized that they *had the discretion* to hear an appeal so long as custody of the fugitive-appellant 'had been restored before the appellate process was ever initiated,' *id.* at 685-6, as was the case there. *Accordingly*, we held that Pennsylvania's fugitive forfeiture rule was not an adequate and independent state rule." *Lines v. Larkin*, 208 F.3d 153, 168-69 (3rd Cir. 2000) (emphasis supplied).

Plainly, the Third Circuit believes that the state rule in question was not being consistently or strictly applied because the state courts "*had discretion.*" And the consequence of such discretion ("*Accordingly, ...*") is that the rule cannot be considered firmly established, and is ("*therefore*") an inadequate state ground.

Thus, despite respondent's attempts to depict the case as an unimportant excursion into old and outmoded procedural minutiae, the real issue here remains both current and compelling: the federal court of appeals explicitly equates discretion with inadequacy.

For that reason, respondent's remonstration that Pennsylvania no longer has a discretionary fugitive waiver rule is of no moment. It is true that, years after the decision in this case, the Pennsylvania courts retreated from a discretionary rule in favor of a series of categorical requirements that depend entirely on the stage of the proceedings at which the defendant flees or is recaptured. *See Commonwealth v. Deemer*, 705 A.2d 827 (Pa. 1997). But the whole problem with the circuit's approach to adequate state grounds analysis is that it forces the states to abandon all flexibility if they are to have any hope that their rules will ever be enforced by federal courts.

Thus the stakes here have never been about the status of Pennsylvania's fugitive dismissal rule

in itself. The consequence of a flawed adequacy standard is that it tends to undermine an entire spectrum of state procedural requirements. And indeed in recent years the Third Circuit has repeatedly refused to honor a variety of Pennsylvania rules of procedure.[3]

Respondent nonetheless insists that there is no real cause for concern, because any discussion of discretion in the adequate-state-grounds context is really just a way of ensuring that state rules are being consistently applied. But a "consistency"

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[3]*See, e.g., Holland v. Horn*, 519 F.3d 107 (2008); *Fahy v. Horn*, 516 F.3d 169 (2008); *Leyva v. Williams*, 504 F.3d 357 (2007); *Holiday v. Varner*, 176 Fed. Appx. 284 (2006) (unpublished); *Jermyn v. Horn*, 266 F.3d 257 (2001).

Pennsylvania Supreme Court Justices have not failed to notice "the federal courts' seeming receptiveness to theories allowing them to ignore Pennsylvania state court procedural defaults.... To the extent we would concern ourselves with the coin-flip that is federal habeas review, the result can be very bad law, since every state court response to a particularly egregious, unusual circumstance will be argued, in federal court, as proof that state rules of procedural default are uneven and should not be honored." *Commonwealth v. Steele*, 961 A.2d 786, 837-38 (Pa. 2008) (Castille, J., concurring, with McCaffery, J.); *see also Commonwealth v. Gibson*, 951 A.2d 1110, 1150 (Pa. 2008) ("The threat of dismissive federal responses to flexible state procedural rules can lead to state legislatures and courts adopting ever-more inflexible rules") (Castille, J., concurring, with McCaffery, J.).

test for adequacy – or a "firmly established" test, or a "regularly followed" test – is no different in essence than a discretion test. All of these standards subvert common, useful tools of judicial flexibility, such as plain error and miscarriage of justice, and invite federal courts to second-guess, in the smallest detail, the state courts' application of their own procedural rules.

That is why Wright & Miller attack the discretion test for adequacy and propose instead what is basically a due process approach. *See* 16B C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 4026, 4027 (2nd ed. 1996). If the state rule provides reasonable notice and opportunity to permit preservation of legal claims, then the failure to comply with the rule is an adequate ground to bar federal review.

Under such an approach, it should have been an easy matter to uphold the state default imposed here. To comply with Pennsylvania's fugitive forfeiture rule, respondent had to do only one simple thing – *not escape*. Instead he undertook considerable effort to do just that. Then he broke out of prison again – *after* his post-verdict motions had been dismissed as a result of his first flight. There was simply no way respondent could have believed that this conduct would be without consequence to his legal rights. If the adequate-state-grounds principle can be understood, even in such a case, to negate the state court default, then

there is a clear need for further examination of the doctrine.

Conclusion

For the reasons set forth above and in the certiorari petition, petitioners respectfully request that this Court grant the writ.

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JOINT APPENDIX

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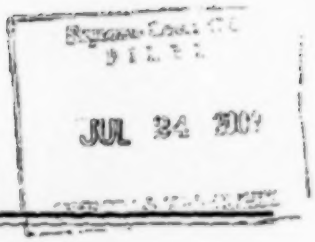
(9)

No. 08-992



In The
Supreme Court of the United States

JEFFREY A. BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL.,
Petitioners,

v.

JOSEPH J. KINDLER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX, VOL. 1 of 2

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July, 2009

Petition for Certiorari Filed February 2, 2009
Petition for Certiorari Granted May 18, 2009

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RELEVANT DOCKET ENTRIES

Court of Common Pleas
Trial Division Appeals Unit

1982, August
2747 – Kidnapping – Force, Threat Or Deception
2748 – Criminal Conspiracy
2750 – Murder Voluntary Manslaughter

Commonwealth v. Joseph Kindler

Date	Description
9-1-82	Notice of Joint Trial, filed.
	* * *
9-1-82	Defendant has been arraigned under Penn. Crim. Code Section 303-306. By the Court, Ribner, J.
	* * *
10-19-83	Motions to Suppress: 1. Physical evidence taken from home Granted. 2. Written statement given by the Defendant Denied. 3. Clothing Defendant wearing at the time of arrest Denied. By the Court, Geisz, J.
	* * *

10-24-83 Defendant Pleads:
2747 – Not Guilty.
2748 – Not Guilty.
2750 – Not Guilty to Murder Generally.

* * *

11-15-83 Jury returns with a Verdict of:
2747 – Guilty
2748 – Guilty
2750 – Guilty – Murder, 2nd Degree
Imposition of sentence deferred.
*** By the Court, Geisz, J.

11-16-83 On Bill 2750 –

Jury heard testimony on Death Penalty:

After due deliberation, jury returns:

Finding two aggravating curcumstances and no mitigating circumstances, set penalty by Death. Jury polled.

Imposition of sentence deferred. Pre-sentence investigation and psychiatric examination ordered. *** By the Court, Geisz, J.

* * *

11-28-83 Motion for New Trial, filed.

* * *

7-16-84	Supplemental Post Verdict Motions in Support of a New Trial and/or in Arrest of Judgment and/or the Imposition of a Sentence of Life Imprisonment, filed.
10-10-84	*** Defense Attorney needs time to answer Petition. District Attorney needs witnesses. Argument to determine if Defendant has escaped and if Post verdict Motions should be dismissed. By the Court, Geisz, J.
10-10-84	Commonwealth's Petition to Dismiss Defendant's Post Verdict Motions, filed.
10-15-84	Defendant's Answer to commonwealth's Petition to Dismiss Defendant's Post Verdict Motions, filed.
10-23-84	*** The Court finds and observes that after further investigation, the Defendant is missing. The Court has observed photos of the defendant and recognizes that the person depicted in the photo is indeed the Defendant. The Defendant was sent to the Detention Center to be kept in the maximum security division. Defendant did voluntary remove himself from the Detention Center by escaping / and loses all legal rights and priviledges for Post Trial Motions. The Motions to Arrest Judgment and for a New Trial Denied. (See notes of Testimony). Formal sentencing for Death is continued until further notice. By the Court, Geisz, J.

4-29-88 *** Bench warrant issued for administrative purposes. To be heard by Judge Geisz only. By the Court, Geisz, J.

10-3-91 *** Bench warrant was withdrawn.

Defense Counsel Petition to Reinstate Post Verdict Motions Denied.

10-3-91 AND NOW SENTENCE:

2747 – Not less than (10) ten years nor more than (20) twenty years in SCI to run consecutive to CP 8208-2750. Murder 1 and CP 8208-2748 Criminal Conspiracy. Credit time in State/Phila. Prison only. Defense co-petition to withdraw subsequent to sentencing Granted. By the Court, Geisz, J.

2748 – Not less than (5) five years nor more than (10) years in State Corr. Inst. To run concurrent to CP 8208-2750. Pay $15.00, $10.00 and $5.00 – funds within any parole period. Credit time in Penna. State/Phila. Correctional Institutions only. Defense counsel to withdraw subsequent to sentencing granted. By the Court, Geisz, J.

2750 – DEATH BY LETHAL INJECTION.

Defense counsel petition to withdraw subsequent to sentencing Granted. By the Court, Geisz, J.

10-22-91 Notice of Appeal To Supreme Court, filed at ***#155 E.D.A.D. 1991.***

* * *

3-4-92 Opinion filed. ***Clarke, J.***

* * *

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

155 E.D. Appeal Docket 1991

Commonwealth of Pennsylvania v. Joseph Kindler

Date	Description
10/22/1991	Notice of Appeal Filed
4/30/1993	Order. Per Curiam. AND NOW, to-wit, this 30th day of April, 1993, upon consideration of the Appellant's Application for Post-Submission Communication Pursuant to Rule 2510(a) and the response thereto, it is hereby ORDERED that the Application for Post-Submission Communication is granted and the case is to be reargued at the October, 1993 Session of the Court in Philadelphia. The parties are directed to file briefs on the issue of the applicability of Ortega-Rodriguez v. U.S., ___U.S. ___, 61 L.W. 4225 (1993), to this case.
2/9/1994	Judgment of Sentence of DEATH affirmed.
2/22/1994	Application for Reargument Filed
4/8/1994	Application for Reargument Denied

IN THE SUPREME COURT OF THE UNITED STATES

No. 94-5055

Joseph Kindler v. Commonwealth of Pennsylvania

Date	Description
7/5/1994	Petition for Writ of Certiorari to the Supreme Court of Pennsylvania docketed
10/11/1994	Petition for Writ of Certiorari denied

Court of Common Pleas
Trial Division Appeals Unit

1982, August
2747 – Kidnapping – Force, Threat Or Deception
2748 – Criminal Conspiracy
2750 – Murder Voluntary Manslaughter

Commonwealth v. Joseph Kindler

Date	Description
1-11-96	Petition For Relief Under Post Conviction Relief Act, filed.
4-10-96	Commonwealth's Motion To Dismiss, filed.
	* * *
8-8-96	Petitioner's Response To Commonwealth's Motion To Dismiss, filed.
8-15-96	*** Commonwealth's Motion To Dismiss PCRA Petition is Hereby ***Granted.*** ***Lineberger, J.***
9-10-96	Notice of Appeal to SUPREME Court from the final Order/XXXXXXXX entered on August 15, 1996
	* * *

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

151 Capital Appeal Docket

Commonwealth of Pennsylvania v. Joseph Kindler

Date	Description
9/10/1996	Notice of Appeal Filed
12/11/1998	Affirmed
12/22/1998	Application for Reargument Filed
3/15/1999	Application for Reargument Denied

United States District Court for the
Eastern District of Pennsylvania (Philadelphia)

2:99-cv-00161-JCJ

Joseph J. Kindler v. Commissioner
Martin Horn, et al.

Date	Entry	Description
01/12/1999	1	MOTION BY PETITIONER JOSEPH J. KINDLER FOR APPOINTMENT OF FEDERAL HABEAS CORPUS COUNSEL UNDER 21 USC S848q A STAY OF EXECUTION , AND LEAVE TO PROCEED IN FORMA PAUPERIS , CERTIFICATE OF SERVICE. (gm) (Entered: 01/12/1999)
		* * *
02/09/1999	3	ORDER THAT UPON CONSIDERATION OF THE MOTION OF PETITIONER, JOSEPH J. KINDLER, FOR APPOINTMENT OF FEDERAL HABEAS CORPUS COUNSEL, TO PROCEED IN FORMA PAUPERIS AND FOR STAY OF EXECUTION AND IT APPEARING TO THE COURT THAT GOOD CAUSE EXISTS THEREFOR AND THAT THERE IS NO OPPOSITION THERETO, IT IS HEREBY ORDERED THAT

		THE MOTION IS GRANTED, A STAY OF EXECUTION IS ENTERED, PETITIONER MAY PROCEED IN FORMA PAUPERIS AND ROBERT BRETT DUNHAM, ESQ. OF THE CENTER FOR LEGAL EDUCATION, ADVOCACY & DEFENSE ASSISTANCE IS APPOINTED (ETC) TO REPRESENT PETITIONER WITH REGARD TO THE FILING AND PRESENTATION OF HIS HABEAS CORPUS RELIEF, ETC. (SIGNED BY JUDGE J. C. JOYNER) 2/9/99 ENTERED AND COPIES MAILED AND FAXED. (gm) (Entered: 02/09/1999)
02/24/1999	4	MOTION BY RESPONDENTS FOR RECONSIDERATION (OF ORDER) , CERTIFICATE OF SERVICE. (gm) (Entered: 02/25/1999)
02/26/1999	5	Response by PETITIONER JOSEPH J. KINDLER to Respondents' MOTION FOR RECONSIDERATION, Certificate of Service. (jl) (Entered: 02/26/1999)
03/12/1999	6	ORDER THAT UPON CONSIDERATION OF THE MOTION OF RESPONDENTS FOR RECONSIDERATION OF

		THIS COURT'S ORDER OF FEBRUARY 9, 1999, APPOINTING FEDERAL HABEAS CORPUS COUNSEL TO PETITIONER, ETC., IT IS HEREBY ORDERED THAT THE MOTION IS DENIED, ETC. (SIGNED BY JUDGE J. C. JOYNER) 3/15/99 ENTERED AND COPIES MAILED AND FAXED. (gm) (Entered: 03/15/1999)
04/08/1999	7	Notice of appeal by RESPONDENTS, *** (Entered: 04/09/1999)
		* * *
03/13/2000	9	Relator's amended petition for writ of habeas corpus and consolidated preliminary memorandum of law, Certificate of service (ph) (Entered: 03/13/2000)
		* * *
06/24/2002	16	Relator's first amended petition for writ of habeas corpus and consolidated memorandum of law, cert of service. (gm) (Entered: 06/25/2002)
		* * *
09/16/2002	20	Response to Amended Petition-writ of habeas corpus by

RESPONDENT(S), cert of service. (gm) (Entered: 09/17/2002)

* * *

12/17/2002 27 PETITIONER JOSEPH J. KINDLER reply memorandum in support of first amended petition for writ of habeas corpus , Certificate of Service. (lvj) (Entered: 12/18/2002)

* * *

01/17/2003 32 MOTION by PETITIONER JOSEPH J. KINDLER FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO CLAIM I OF THE PETITION (ph) (Entered: 01/17/2003)

* * *

02/18/2003 35 ORDER STAYING MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO CLAIM I OF THE PETITION UNTIL 30 DAYS AFTER THE DATE ON WHICH THIS COURT ISSUES ITS DECISION ON PETITIONER'S AMENDED PETITION FOR WRIT OF HABEAS CORPUS(SIGNED BY JUDGE J. C. JOYNER) 2/19/03 ENTERED AND COPIES MAILED AND FAXED. (ph) (Entered: 02/19/2003)

* * *

08/19/2003	49	ORDER THAT THE MOTION FOR LEAVE TO FILE RESPONSE IS DENIED AS MOOT. SIGNED BY JUDGE J. CURTIS JOYNER ON 8/18/03.8/20/03 ENTERED AND COPIES MAILED. (fb) (Entered: 08/20/2003)
08/19/2003	50	ORDER THAT THE MOTION FOR RECONSIDERATION IS DENIED, ETC.. SIGNED BY JUDGE J. CURTIS JOYNER ON 8/18/03.8/20/03 ENTERED AND COPIES MAILED. (fb) (Entered: 08/20/2003)
09/24/2003	51	MEMORANDUM AND ORDER THAT PETITION FOR WRIT OF HABEAS CORPUS IS GRANTED, ETC. IT IS FURTHER ORDERED THAT THE EXECUTION OF THE WARIT OF HABEAS CORPUS IS STAYED FOR 180 DAYS FROM THE DATE OF THIS ORDER, ETC. NO CERTIFICATE OF APPEALABILITY SHALL ISSUE. SIGNED BY JUDGE J. CURTIS JOYNER ON 09/23/03. 09/26/03 ENTERED AND COPIES MAILED(ar,) (Entered: 09/26/2003)

10/17/2003	52	NOTICE OF APPEAL as to 51 Order, by MARTIN HORN, JOSEPH P. MAZURKIEWICZ, DONALD T. VAUGHN. *** (Entered: 10/20/2003)

* * *

10/21/2003	54	NOTICE OF APPEAL as to 51 Order, by JOSEPH J. KINDLER. *** (Entered: 10/22/2003)

* * *

02/12/2004	58	MOTION TO STAY PENDING APPEAL FILED BY RESPONDENTS' JOSEPH P. MAZURKIEWICZ, DONALD T. VAUGHN, MARTIN HORN, ***(Entered: 02/12/2004)
02/23/2004	59	ORDER THAT THE WRIT OF HABEAS CORPUS GRANTED IN THIS COURT'S ORDER OF 9/23/03 IS HEREBY STAYED PENDING FURTHER ORDER OF THE COURT. SIGNED BY JUDGE J. CURTIS JOYNER ON 2/20/04.2/23/04 ENTERED AND COPIES MAILED. (fb) Modified on 2/23/2004 (fb). (Entered: 02/23/2004)

* * *

United States Court of Appeals
for the Third Circuit

99-9002

Kindler v. Horn, et al.

Date	Description
04/12/1999	CIVIL CASE DOCKETED. Notice filed by Martin Horn, Donald Vaughn, Joseph Mazurkiewicz.
	* * *
04/16/2001	ARGUED Monday, April 16, 2001 Panel: Scirica, Alito and McKee, Circuit Judges. (MAC)
04/25/2001	ORDER (Scirica, Authoring Judge, Alito and McKee, Circuit Judges) vacating the District Court order of 2/9/99, granting the stay of execution without prejudice to Kindler's filing a new motion for stay of execution in the appropriate circumstances, filed. [See Order for complete text].
	* * *

United States Court of Appeals
for the Third Circuit

03-9010

Kindler v. Horn, et al.

11/21/2003 CIVIL CASE DOCKETED. Notice filed by Martin Horn, Donald Vaughn and Joseph Mazurkiewicz.

* * *

03/18/2004 ORDER (Clerk), At the direction of the Court, it is hereby ordered that the appeals at Nos. 03-9010 and 03-9011 are hereby stayed pending the U.S. Supreme Court's decision in Beard v. Banks, No. 02-1603, filed.

09/08/2004 ORDER (Clerk) by order entered March 18, 2004, the above captioned appeals were stayed pending the decision of the Supreme Court of the United States in Beard v. Banks, No. 02-1603. The Supreme Court of the United States issued its opinion in Beard v. Banks on June 24, 2004. Accordingly, it is O R E D E R D that they stay is hereby lifted. The parties are directed to file written memoranda within 21 days from the date of this order as to what effect the Supreme Court's ruling has on the present appeals, filed. (NR)

* * *

11/29/2004 UNOPPOSED MOTION by Appellants/Cross-Appellees Martin Horn, Donald Vaughn and Joseph Mazurkiewicz in 03-9010 and 03-9011 to stay further proceedings pending disposition by United States Supreme Court of related cases, filed. Certificate of Service dated 11/29/04.

12/01/2004 ORDER (Alito, Authoring Judge, Fuentes and Stapleton, Circuit Judges) granting unopposed motion by Appellants/Cross-Appellees Martin Horn, Donald Vaughn and Joseph Mazurkiewicz in 03-9010 and 03-9011 to stay further proceedings pending disposition by United States Supreme Court of related cases, filed.

* * *

12/29/2005 ORDER (Clerk), By the Court's Order entered on December 1, 2004, the cross-appeals at Nos. 03-9010 and 03-9011 were stayed pending the decision by the United States Supreme Court in Beard v. Banks, No. 02-1603. As the United States Supreme Court entered an order on September 30, 2003 granting the petition for writ of certiorari in Beard v. Banks, No. 02-1603; as the United States Supreme Court entered an opinion on June 24, 2004 reversing the judgment of this Court and remanding for further proceedings and as this Court entered an order on August 24, 2004 affirming the

order of the district court denying a writ of habeas corpus in Beard v. Banks, CA No. 99-9005, it is hereby ordered that the stay is lifted. It is further ordered that the Clerk shall issue a new cross-appeal briefing schedule, filed.

* * *

02/08/2007 UNOPPOSED MOTION by Appellee/Cross-Appellant Joseph J. Kindler in 03-9010 and 03-9011 to stay proceedings or toll briefing schedule pending disposition by United States Supreme Court of Lawrence v. Florida, filed. Certificate of Service dated 2/8/07.

02/09/2007 ORDER (McKee, Authoring Judge, Fuentes and Stapleton, Circuit Judges) denying UNOPPOSED MOTION by Appellee/Cross-Appellant Joseph J. Kindler in 03-9010 and 03-9011 to stay proceedings or toll the briefing schedule pending disposition by United States Supreme Court of Lawrence v. Florida, filed.

* * *

09/14/2007 ORDER (McKee, Authoring Judge, Fuentes and Stapleton, Circuit Judges) granting motion for Leave to File Fourth Step Brief in Excess of Word Limitation Containing 10,500 words and to Respond to Argument Raised for the First Time in the Commonwealth's Third Step Brief in 03-9010 and 03-9011, filed. (EAF)

* * *

10/15/2007 ARGUED Monday, October 15, 2007 Panel: McKee, Fuentes and Stapleton, Circuit Judges. Counsel for Appellants/Cross Appellees: David G. Glebe and Counsel for Appellee/Cross Appellant: Matthew C. Lawry and Maria K. Pulzetti. (MAC)

* * *

01/29/2008 ORDER (McKee, Authoring Judge, Fuentes and Stapleton, Circuit Judges) The foregoing motion by Appellants/Cross-Appellees to consider brief surreply, as included herein, and to permit lodging of supplement to appendices is hereby GRANTED, filed. (CMD)

02/07/2008 EXHIBIT(S) [DVD] on behalf of Appellants/Cross-Appellees in 03-9010 and 03-9011, filed. Location: Safe. SEND TO MERITS PANEL [03-9010, 03-9011] (MCW)

* * *

09/03/2008 PRECEDENTIAL OPINION Coram: MCKEE, Authoring Judge, FUENTES and STAPLETON, Circuit Judges. Total Pages: 69. Judge: MCKEE Authoring, [03-9010, 03-9011] (CMD)

09/03/2008 JUDGMENT, Affirmed. [03-9010, 03-9011] (CMD)

09/24/2008	ORDER AMENDING OPINION (Coram: MCKEE, FUENTES and STAPLETON, Circuit Judges) McKee, Authoring Judge. [03-9011, 03-9010]--[Edited 09/24/2008 by MGD] VACATED PER COURT'S ORDER ENTERED SEPTEMBER 29, 2008.--[Edited 09/29/2008 by CMD] (CMD)

* * *

09/29/2008	ORDER AMENDING OPINION (Coram: MCKEE, FUENTES and STAPLETON, Circuit Judges). McKee Authoring Judge. [03-9010, 03-9011] (CMD)

* * *

United States Court of Appeals
for the Third Circuit

03-9011

Kindler v. Horn, et al.

Date	Description
11/21/2003	CIVIL CASE DOCKETED. Notice filed by Joseph J. Kindler.
	* * *
03/18/2004	ORDER (Clerk), At the direction of the Court, it is hereby ordered that the appeals at Nos. 03-9010 and 03-9011 are hereby stayed pending the U.S. Supreme Court's decision in Beard v. Banks, No. 02-1603, filed.
	* * *
03/23/2004	APPLICATION by Appellant Joseph J. Kindler for certificate of appealability, filed. Certificate of Service dated 2/4/04.
03/23/2004	RESPONSE by Appellees Martin Horn, Donald Vaughn and Joseph Mazurkiewicz in Opposition to Application by Appellant Joseph J. Kindler for certificate of appealability, filed. Certificate of Service dated 3/5/04.
	* * *
04/19/2004	REPLY by Appellant Joseph J. Kindler to Appellees' RESPONSE in Opposition to

Appellant's application for certificate of appealability, filed. Certificate of service date 4/12/04.

09/08/2004 ORDER (Clerk) by order entered March 18, 2004, the above captioned appeals were stayed pending the decision of the Supreme Court of the United States in Beard v. Banks, No. 02-1603. The Supreme Court of the United States issued its opinion in Beard v. Banks on June 24, 2004. Accordingly, it is O R E D E R D that they stay is hereby lifted. The parties are directed to file written memoranda within 21 days from the date of this order as to what effect the Supreme Court's ruling has on the present appeals, filed. (NR)

* * *

10/21/2004 ORDER (Alito, Authoring Judge, Fuentes and Stapleton, Circuit Judges), The foregoing request by Appellant Joseph J. Kindler for a certificate of appealability is GRANTED as to Kindler's claims that (1) he was deprived of the effective assistance of counsel at sentencing, and the District Court erred in denying this claim without a hearing and (2) he is entitled to relief from his death sentence because the jury was not instructed that he would be ineligible for parole if sentenced to life imprisonment. A certificate of appeability is DENIED as to Kindler's claims that (1) the failure to

prepare and/or preserve the transcripts from the severance hearing and from two days of voir dire violated due process and a meaningful appeal of Kindler's convictions and death sentence (the transcripts claim); (2) the death sentence must be vacated because the "proportionality review" performed by the Pennsylvania Supreme Court did not provide him the meaningful appellate review mandated by 42 Pa. Cons. Stat. Section 9711(h)(3)(iii), and the Eighth and Fourteenth Amendments; and (3) a new sentencing proceeding is required because the sentencing process in this case violated Ring v. Arizona, 536 U.S. 584 (2002). As to these claims, Kindler has failed to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. Section 2253(c)(2); see Banks v. Dretke, 124 S.Ct. 1256, 1280 (2004))("To obtain a certificate of appealability, a prisoner must 'demonstrat[e] that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'")(quoting Miller-El v. Cockrell, 537 U.S. 322, 327 (2003)). With respect to the transcripts claim, jurists of reason could not debate that relief was properly denied on the merits for essentially the reasons given by the District Court. See

Kindler v. Horn, 291 F.Supp. 2d 323, 344-46 (E.D. Pa. 2003). Similarly, with respect to the claim based on the Pennsylvania Supreme Court's proportionality review, jurists of reason could not debate that relief was properly denied on the merits based on the standards set forth in Riley v. Taylor, 277 F.3d 261, 311 (3d Cir. 2001)(en banc). Finally, Kindler's arguments for a retroactive application of Ring v. Arizona is foreclosed by Schriro v. Summerlin, 124 S.Ct. 2519 (2004), and thus his claim based on the Ring decision is not debatable among of reason, filed. EPS-66

* * *

11/29/2004 UNOPPOSED MOTION by Appellants/Cross-Appellees Martin Horn, Donald Vaughn and Joseph Mazurkiewicz in 03-9010 and 03-9011 to stay further proceedings pending disposition by United States Supreme Court of related cases, filed. Certificate of Service dated 11/29/04.

12/01/2004 ORDER (Alito, Authoring Judge, Fuentes and Stapleton, Circuit Judges) granting unopposed motion by Appellants/Cross-Appellees Martin Horn, Donald Vaughn and Joseph Mazurkiewicz in 03-9010 and 03-9011 to stay further proceedings pending disposition by United States Supreme Court of related cases, filed.

* * *

12/29/2005 ORDER (Clerk), By the Court's Order entered on December 1, 2004, the cross-appeals at Nos. 03-9010 and 03-9011 were stayed pending the decision by the United States Supreme Court in Beard v. Banks, No. 02-1603. As the United States Supreme Court entered an order on September 30, 2003 granting the petition for writ of certiorari in Beard v. Banks, No. 02-1603; as the United States Supreme Court entered an opinion on June 24, 2004 reversing the judgment of this Court and remanding for further proceedings and as this Court entered an order on August 24, 2004 affirming the order of the district court denying a writ of habeas corpus in Beard v. Banks, CA No. 99-9005, it is hereby ordered that the stay is lifted. It is further ordered that the Clerk shall issue a new cross-appeal briefing schedule, filed.

* * *

02/08/2007 UNOPPOSED MOTION by Appellee/Cross-Appellant Joseph J. Kindler in 03-9010 and 03-9011 to stay proceedings or toll briefing schedule pending disposition by United States Supreme Court of Lawrence v. Florida, filed. Certificate of Service dated 2/8/07.

02/09/2007 ORDER (McKee, Authoring Judge, Fuentes and Stapleton, Circuit Judges)

denying UNOPPOSED MOTION by Appellee/Cross-Appellant Joseph J. Kindler in 03-9010 and 03-9011 to stay proceedings or toll the briefing schedule pending disposition by United States Supreme Court of Lawrence v. Florida, filed.

* * *

09/14/2007 ORDER (McKee, Authoring Judge, Fuentes and Stapleton, Circuit Judges) granting motion for Leave to File Fourth Step Brief in Excess of Word Limitation Containing 10,500 words and to Respond to Argument Raised for the First Time in the Commonwealth's Third Step Brief in 03-9010 and 03-9011, filed. (EAF)

* * *

10/15/2007 ARGUED Monday, October 15, 2007 Panel: McKee, Fuentes and Stapleton, Circuit Judges. Counsel for Appellants/Cross Appellees: David G. Glebe and Counsel for Appellee/Cross Appellant: Matthew C. Lawry and Maria K. Pulzetti. (MAC)

* * *

01/29/2008 ORDER (McKee, Authoring Judge, Fuentes and Stapleton, Circuit Judges) The foregoing motion by Appellants/Cross-Appellees to consider brief surreply, as included herein, and to permit lodging of supplement to

appendices is hereby GRANTED, filed. (CMD)

02/07/2008 EXHIBIT(S) [DVD] on behalf of Appellants/Cross-Appellees in 03-9010 and 03-9011, filed. Location: Safe. SEND TO MERITS PANEL [03-9010, 03-9011] (MCW)

* * *

09/03/2008 PRECEDENTIAL OPINION Coram: MCKEE, Authoring Judge, FUENTES and STAPLETON, Circuit Judges. Total Pages: 69. Judge: MCKEE Authoring, [03-9010, 03-9011] (CMD)

09/03/2008 JUDGMENT, Affirmed. [03-9010, 03-9011] (CMD)

09/24/2008 ORDER AMENDING OPINION (Coram: MCKEE, FUENTES and STAPLETON, Circuit Judges) McKee, Authoring Judge. [03-9011, 03-9010]--[Edited 09/24/2008 by MGD] VACATED PER COURT'S ORDER ENTERED SEPTEMBER 29, 2008.--[Edited 09/29/2008 by CMD] (CMD)

* * *

09/29/2008 ORDER AMENDING OPINION (Coram: MCKEE, FUENTES and STAPLETON, Circuit Judges). McKee Authoring Judge. [03-9010, 03-9011] (CMD)

* * *

Trial Judge: Geisz, J.
Room: 633
Date: 11-18-83
Verdict: Guilty

LaCheen & Alva
BY: DANIEL-PAUL ALVA, ESQUIRE
IDENTIFICATION NO. 15640
31st FLOOR LEWIS TOWER BUILDING
PHILADELPHIA, PENNSYLVANIA 19102
(215) 715-5900
Attorney for Defendant

PHILADELPHIA COUNTY
COURT OF COMMON PLEAS
TRIAL *DIVISION*
CRIMINAL SECTION

AUGUST *TERM*, 1982
Nos. 2747-2752
SUR CHARGE: Homicide

[Filed November 28, 1983]

COMMONWEALTH OF PENNSYLVANIA	)
	)
vs.	)
	)
JOSEPH KINDLER	)
	)

MOTION FOR NEW TRIAL

AND NOW, this 28th day of November 1983, the defendant against whom a verdict of guilty was

entered and following which the death sentence was rendered by a jury on November 16th 1983, before the Honorable John A. GEISZ in Courtroom 633, City Hall in the above captioned matter, moves the Court for a New Trial and in furtherance thereof avers the following:

1. The Court erred in failing to grant defendant's numerous requests for a severance because:

    a. The Commonwealth failed to produce even a threshold showing if the need to try the defendants together; and
    b. The Defendant was denied a fair trial because the co-defendant had not taken the stand, thus depriving defendant of his defense (see below);
    c. The defendant was practically guaranteed the death penalty by the Commonwealth's ploy of "giving life" to the co-defendant and demanding death for him; and
    d. The Court failed to properly weigh the evidence for the defendant to have a fair trial versus the Commonwealth's desire to try the cases together.

2. The Court erred in ruling that the defendant could not call decedent's father, Morton Bernstein, as a defense witness because:

    a. Said testimony would have reputed the Commonwealth's "theory" that the defendant was the "mastermind" behind the Montgomery County burglary thus reputing:

        1. that defendant had a strong motive to kill decedent; and

2. that defendant used younger individuals to do his biddings; and
3. that defendant was a minipulation; and
4. that decedent was acting in "the interests of justice" by testifying; and

b. Said testimony would have indicated that decedent planned the Montgomery County burglary.

3. The Court erred in allowing over objection, the testimony of Detective Carl Molt which was clearly heresay because:

a. Said heresay implicated defendant in the Montgomery County crime and to a degree greater than was true; and
b. placed the defendant in the driver's seat during that crime, both literally and figuratively.

4. The Court erred in failing to declare a mistrial despite numerous instances of prosecutorial misconduct. Said misconduct consisted of:

a. deliberately seeking heresay testimony from Detective Molt and misleading the Court as to it's reliability (See above); and
b. eliciting from the witness Paula Solomon a remark calculated to prejudice the jury and deprive defendant of a fair trial to wit, "defendant would rather die than go to jail", and
c. violated the rules of discovery by failing to give counsel notice of his knowledge of the information received from Ms. Solomon, and then sitting back waiting for counsel to "open the door."

d. maintaining a unique "open door policy" whereby if either counsel challenged on cross examination his evidence, he felt obliged to rebut said cross with prejudicial, immaterial evidence; and
e. leading Michele Raifer to testify that Judge Geisz who presided over the trial would also be his sentencing Judge. This of course ultimately led to the Court's outburst which prejudiced the defense in front of the jury.

5. The Court erred in ruling that the defendant could not put forth relevant and competent evidence as part of his defense, to wit:

   a. the full testimony is offered of William DiLeo; and
   b. the notes of testimony of Scott Shaw's (co-defendant) earlier hearings whereby he had implicated defendant only to retract same. Said notes would have been corroborated and made admissible by the Assistant District Attorneys who participated in said hearings.

6. The failure of the Court to allow into evidence the notes and all the relevant testimony pertaining thereto deprived defendant of a fair trial because they provided:

   a. clear rebuttal of his motive; and
   b. provided a motive greater for that of the co-defendant; and
   c. an explanation to Michele Raifer's testimony since she was co-defendant's lover; and
   d. the jury with evidence that Raifer and Shaw had a motive to lie against him based not in

theory, but in the practice of the preceeding three (3) years.

7. The Court erred in failing to poll the jury as requested following the questions from the jury on aggravating vs. instigating circumstances which clearly demonstrated their confusion and which may very well have doomed the defendant to the death penalty.

8. The Death Penalty statute as presently worded is unconstitutional because:

   a. it provides cruel and unusual punishment; and
   b. does not provide for the defendant to have a reconsideration of sentence within thirty (30) days as provided by 12 P.S. 1032 unless the Court orders the reempanelment of the jury to hear additional evidence.

Defendant deserves the right to file additional reasons why he should receive a New Trial upon receipt of the Notes of Testimony herein.

Respectfully submitted,

/s/_____
DANIEL-PAUL ALVA, ESQUIRE
Attorney for Defendant
JOSEPH KINDLER

COMMONWEALTH OF PENNSYLVANIA

:SS

COUNTY OF PHILADELPHIA

The Undersigned, being duly sworn according to law, hereby deposes and says that he/she is Attorney for the Defendant, JOSEPH KINDLER in the foregoing Motion for New Trial and that all of the facts set forth therein are true and correct to the best of his/her knowledge, information and belief.

Further, deponent sayeth not.

/s/_____(SEAL)
DANIEL-PAUL ALVA, ESQUIRE

SWORN TO AND SUBSCRIBED
before me this 28th day
of November, 1983.

/s/_____
NOTARY PUBLIC
[SEAL]

Trial Judge	: Geisz, J.
Courtroom	: 633
Date	: November 16, 198[ ]
Verdict	: Guilty-Murder (First Degree) and Related Offenses
Jury's Recommendation	: Death
Court-Appointed By	: Katz, J.
Next Listing	: August 21, 1984

NANCY D. WASSER
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Attorney for Defendant

PHILADELPHIA COUNTY
COURT OF COMMON PLEAS
CRIMINAL TRIAL *DIVISION*

August *TERM*, 1982
No. 2747-2752

[Filed July 16, 1984]

COMMONWEALTH OF PENNSYLVANIA)
)
v.)
)
JOSEPH KINDLER)
)

SUPPLEMENTAL POST-VERDICT MOTIONS IN SUPPORT OF A NEW TRIAL AND/OR AN ARREST OF JUDGMENT AND/OR THE IMPOSITION OF A SENTENCE OF LIFE IMPRISONMENT

Defendant, Joseph Kindler, by and through undersigned court-appointed counsel respectfully requests that this Court grant him a new trial and/or an arrest of judgment and/or the imposition of a sentence of life imprisonment and in support thereof advances the following supplemental grounds in addition to those filed and raised in his original November 28, 1983, motion:

A. IMPOSITION OF A LIFE SENTENCE

1. At the sentencing verdict stage the court erred by twice failing properly to define the term "preponderance of evidence" as that term relates to the jury's consideration of mitigating circumstances. As a consequence of this erroneous instruction, the jury was misinformed of the standard of proof to be applied in determining the existence of and weight to be accorded mitigating circumstances. As a result thereof, the jury misapplied the law and reached a factually and legally erroneous conclusion at this critical juncture. Defendant is therefore entitled to have the jury's recommendation of a sentence of death disregarded and is, instead, entitled to a sentence of life imprisonment on his conviction for first degree murder. See N.T. 11/16/83:30,152.

2. At the sentencing verdict stage the court erred by failing to rule, as a matter of law, that the statutory aggravating circumstance of 42 Pa.C.S. §9711 (d)(6),

[defendant committed a killing while in the perpetration of a felony], was not applicable under the facts of this case, could not be argued by the prosecution, and could not be considered by the jury in its sentencing determination. See N.T. 11/16/83:9,32.

3. At the sentencing verdict stage the court erred by failing to rule, as a matter of law, that the statutory aggravating circumstance of 42 Pa.C.S. §9711 (d)(5), [victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offense], was not applicable under the facts of this case, could not be argued by the prosecution, and could not be considered by the jury in its sentencing determination. See N.T. 11/16/83:10-13,32.

4. At the sentencing verdict stage the court erred by failing to rule, as a matter of law, that the statutory aggravating circumstance of 42 Pa.C.S. §9711 (d)(9), [defendant has a significant history of felony convictions involving the use of threat or violence to the person], was not herein applicable as there was no evidence of record to support such a theory, could not be argued by the prosecution, and could not be considered by the jury in its sentencing determination See N.T. 11/16/83:33.

5. At the sentencing verdict stage the court erred by failing to rule, as a matter of law, that the statutory mitigating circumstance of 42 Pa.C.S. §9711 (e)(1), [defendant has no significant history of prior criminal convictions], was applicable herein as defendant had no significant history of prior criminal convictions. See

N.T. 11/16/83:33. Since the jury found no mitigating circumstances, when at a minimum 42 Pa.C.S. §9711 (e)(1) was applicable, it is clear that this error directly contributed to the jury's erroneous conclusion and its recommendation of a sentence of death.

6. At the sentencing verdict stage the court erred by refusing defense counsel's request that the court instruct the jury to disregard the prosecutor's legal argument as to the definition of kidnapping. See N.T. 11/16/83:145-150.

7. At the sentencing verdict stage the court erred when, in response to the then deliberating jury's question, the court instructed the jury that they could only consider and find mitigating circumstances if "all of you had agreed" (N.T. 11/16/83:155). In so doing the court confused and compelled the jury to be unanimous as to a finding on any particular mitigating circumstance thus precluding a finding of mitigation if, e.g. only one juror disagreed. This error was compounded by two additional factors: (1) by the court's refusal to recharge the jury, at defense request, after a review of the sentencing sheet showed the jury found no mitigating circumstances despite the existence of such See N.T. 11/16/83:161-163 and (2) by the court's erroneous definition of preponderance of the evidence (See paragraph 1, supra). Because the legislature mandated that mitigating circumstances only need be established by a preponderance of the evidence, a traditional burden of proof in civil matters, it is apparent that the legislature intended and contemplated that mitigating circumstances could be found even where, as in civil trials, not all jurors are in unanimous agreement.

8. The prosecutor committed deliberate misconduct at the sentencing verdict stage when, at the close of his argument he testified and told the jury that he had been here (at the death phase) before and that he knew that after the jury's recommend the death penalty they "feel good afterwards" (N.T. 11/16/83:145). Such statement of personal belief presumably bottomed on prior first hand experience, appealed to the emotions of the jury by assuring the jurors that they would and should "feel good" not bad if they sentenced a man to die.

9. The court erred at the sentencing verdict stage when it refused defense counsel's request to take the sentencing recommendation function from the jury after the prosecutor committed the misconduct described in paragraph 8, supra. See N.T. 11/16/83: 150-151.

10. The Commonwealth's evidence was insufficient, as a matter of law to establish that:

a) "The victim was a prosecution witness"; and
b) "The defendant committed a killing while in the perpetration of a felony".

Since this evidentiary insufficiency was erroneously ignored by the sentencing jury, their finding of these aggravating circumstances must be overturned and defendant's sentence be fixed at life imprisonment.

11. The sentencing jury's failure to find the existence of mitigating circumstances underscores:

a) the jury's confusion concerning the meaning of preponderance of the evidence;

b) The jury's prejudice towards defendant (caused by the prosecutor's misconduct) and its arbitrary and legally unsupportable refusal to find that defendant had no significant history of prior convictions where there was no evidence presented to the contrary.

12. The Pennsylvania Death Penalty Statute, 42 Pa. C.S. §9711, is void for vagueness and/or overbroad under the Pennsylvania and United States Constitutions since it:

a) fails to define sufficiently and precisely the phrase "prosecution witness to a murder" [§9711(d)(5)];
b) fails to define sufficiently and precisely the phrase "committed a killing while in the perpetration of a felony" [§9711(d)(6)];
c) fails to define sufficiently and precisely the word "significant" as that term is used in §9711(e)(1);
d) fails to define sufficiently and precisely how a jury is to weigh aggravating and mitigating circumstances, i.e. the balancing or burden of proof/persuasion to be used in making this determination;
e) fails to allow the Jury to find the existence of a mitigating circumstance where only one juror so finds; and
f) requires unanimous agreement among the jurors as to a finding of mitigating circumstances and therefore forces a defendant to disprove why a sentence of death is inappropriate whereas, e.g. in cases of self-defense, the unshifting prosecution burden is to prove that the killing was not justified.

13. The Pennsylvania Death Penalty Statute, 42 Pa.C.S. §9711, is unconstitutional in that it:

a) usurps the judicial function to proscribe rules of procedure which power is vested solely in the Pennsylvania Supreme Court;
b) violates the separation of power by relegating the judicial power to a position inferior to that of the legislative branch;
c) vests a jury of laypersons with the power to fix sentence a role and function exclusively within the purview of the judiciary;
d) precludes a defendant from moving to modify his sentence pursuant to Pa.R.Crim. P.1410;
e) is inconsistent and in conflict with Pa.R.Crim. P.1410 (promulgated by the Supreme Court) which procedurally allows for modification of sentence by the judiciary while 42 Pa.C.S. §9711 allows only the jury to fix but never change the sentence; and
f) derogates the common law by allowing and requiring layperson juries to decide and interpret questions of law.

B. FOR A NEW TRIAL AND/OR AN ARREST OF JUDGMENT

14. Defendant was prejudiced when the court crier, after swearing in the jury, erroneously advised the jury that defendant had pled guilty to all charges. See N.T. 11/2/83: 47.

15. The prosecutor deliberately elicited improper hearsay testimony from the deceased's mother (N.T. 11/2/83: 92) concerning the deceased's fear of defendant. Although this testimony, from the

Commonwealth's first witness, was ordered stricken (N.T. 11/2/83: 107) the cautionary instruction was insufficient and the prosecutor then immediately repeated the improper hearsay statement in his next question (N.T. 11/2/83: 107).

16. The prosecutor deliberately asked Detective Cilliberti an improper, leading and designed to elicit hearsay testimony question concerning the deceased's fear of defendant (N.T. 11/3/83: 67). Although the objection was sustained, no further relief, in the form of cautionary instructions, was given.

17. The trial court erred by sua sponte advising the jury concerning sentencing procedure (N.T. 11/4/83: 29-31) which served to undercut just completed defense cross-examination and enhance the Commonwealth's evidence.

18. The prosecutor committed deliberate misconduct during closing argument when he stated the following:

a) "where there are convictions, possibilities of appeal and reversal . . . however, to a certain measure, if you should find them (the defendants) guilty, it would be final. But there is no question if they were found not guilty it would be final" (See N.T.11/14/83: 103);
b) "One person cannot possibly testify, since he's dead" (See N.T. 11/14/83: 108); and
c) "Because ladies and gentleman, David Bernstein will never see 23" (See N.T. 11/14/83: 117). These arguments appealed to the emotions and passions of the jury and were designed to prevent the jury from dispassionately reviewing

the evidence. These remarks were intended to inflame the jury and (a) to encourage a verdict of guilty based on the lack of finality of a guilty verdict rather than the finality of a not guilty verdict (b) to personalize the decedent's death by providing an opportunity for the prosecutor to argue that his best witness was not there and would not walk in.

19. The jury's verdict, both at the verdict and sentencing stages, is infirm as it resulted from improper influence being placed on the jurors from sources outside of the jury itself.

FOR all the foregoing reasons, and for the additional grounds advanced in defendant's original post-verdict motions, defendant respectfully requests that this Court grant him a new trial and/or an arrest of judgment and/or impose a sentence of life imprisonment.

Respectfully submitted,

/s/_____
NANCY D. WASSER
Counsel for Defendant
JOSEPH KINDLER

Dated: July 16, 1984

VERIFICATION

NANCY D. WASSER, hereby verifies that the facts set forth in the foregoing Motion are true and correct to the best of her knowledge, information and belief. I understand that this verification and the facts herein

alleged are subject to the penalties provided by 18 Pa.C.S. §4904 (unsworn falsification to authorities).

/s/_____
NANCY D. WASSER

Dated: July 16, 1984

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

TRIAL DIVISION
CRIMINAL SECTION

AUGUST TERM, 1982
BILLS 2747-2752

[Filed October 10, 1984]

COMMONWEALTH OF PENNSYLVANIA	)
	)
v.	)
	)
JOSEPH J. KINDLER	)
	)

COMMONWEALTH'S PETITION TO DISMISS DEFENDANT'S POST-VERDICT MOTIONS

TO THE HONORABLE JOHN A. GEISZ, JUDGE OF THE SAID COURT:

COMES NOW the Commonwealth, by EDWARD G. RENDELL, District Attorney of Philadelphia County, through his Assistant GEORGE J. SHOTZBARGER, and respectfully represents:

1. On 15 November 1983, and with the Honorable JOHN A. GEISZ of the Philadelphia Court of Common Pleas presiding, defendant JOSEPH J. KINDLER was found guilty by a jury of his peers on the following charges and Bills of Information: murder in the first degree (Bill 2750 of August term, 1982); kidnapping (Bill 2747, same term); and criminal conspiracy (Bill

2748, same term). This conviction arose out of the homicide of victim DAVID BERNSTEIN on 25 July 1982.

2. On 16 November 1983, defendant JOSEPH J. KINDLER was sentenced to death on Bill 2750, by that same jury.

3. Defendant thereafter filed original and then supplemental post-verdict motions challenging both the verdicts and sentence of that jury. The Court has yet to rule upon those post-verdict motions.

4. On 20 September 1984, defendant JOSEPH J. KINDLER, who had been held without bail throughout this case, escaped from the Philadelphia Detention Center: see Commonwealth Exhibits A and B appended hereto. By his flight, defendant has removed himself from the jurisdiction of this Court.

5. "[A] defendant's resort to escape constitutes a flagrant and deliberate bypass of the entire judicial process. The escape of a convicted defendant from confinement may properly be considered a rejection of the legitimate means afforded the defendant for challenging his conviction and imprisonment. Thus, by choosing to flee and live as a fugitive, a defendant forfeits the right to have his claims considered." Commonwealth v. Passaro, 476 A.2d 346 at 349 (Pa. 1984).

6. The above principle of law applies both to appellate claims, as in Passaro, and to motions for post-verdict relief in the trial Court. See Commonwealth v. Lewis, 300 Pa.Superior Ct. 191, 446

A.2d 295 (1982), petition for allowance of appeal denied September 27, 1982.

7. The Supreme Court of the United States has itself reviewed this issue, and has written: "No persuasive reason exists why [a] Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the commission. While such an escape does not strip the case of its character as an adjudicable case for controversy, we believe it disentitles the defendant to call upon the resources of the Court for determination of his claims." Molinaro v. New Jersey, 396 U.S. 365 at 366, 90 S.Ct. 498, 24 L.Ed.2d 586 (1970).

8. No exception to this rule need exist for death penalty cases such as this. See People v. Clark, 201 Cal. 474 (1927), quashing appeal of escaped convict facing death penalty; but see Sprouse v. State, 242 Ga. 837 (1979), wherein appeal not quashed because of death penalty.

9. The Commonwealth therefore requests that this Court dismiss all of defendant's post-verdict motions. However, if this Court deems unwaivable those claims attacking the death penalty and the sufficiency of the evidence to sustain this capital conviction, see Commonwealth v. McKenna, 476 Pa. 428, 383 A.2d 174 (1978), and Commonwealth v. Zettlemoyer, 500 Pa. 16 at 26-27, n.3, 454 A.2d 937 (1983), the Commonwealth alternatively urges the Court to dismiss defendant's post-verdict motions as to all but the penalty and sufficiency issues.

WHEREFORE, the Commonwealth respectfully requests that this Honorable Court dismiss all post-verdict motions filed on behalf of defendant JOSEPH. J. KINDLER, or in the alternative, dismiss all such motions except those raising issues as to the death penalty and the sufficiency of the evidence.

Respectfully submitted,

/s/ George J. Shotzbarger
GEORGE J. SHOTZBARGER
Assistant District Attorney
Homicide Unit

Trial Judge	: Geisz, J.
Courtroom	: 483
Date	: November 16, 1983
Verdict	: Guilty-Murder (First Degree) and Related Offenses
Jury's Recommendation	: Death
Court-Appointed By	: Katz, J.
Next Listing	: October 23, 1984 3:30 p.m. Room 483

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COURT OF COMMON PLEAS
CRIMINAL TRIAL *DIVISION*

August *TERM*, 1982
Nos. 2747-2752

[Filed October 15, 1984]

COMMONWEALTH OF PENNSYLVANIA)
)
v.)
)
JOSEPH KINDLER)
)

DEFENDANT'S ANSWER TO COMMONWEALTH'S PETITION TO DISMISS DEFENDANT'S POST-VERDICT MOTIONS

TO THE HONORABLE JOHN A. GEISZ:

Defendant Joseph Kindler, by and through undersigned counsel respectfully requests that this Court deny the Commonwealth's Petition and in support thereof answers as follows:

1. Admitted as stated.

2. Denied as stated. Although the jury recommended that the penalty be set at death, defendant Kindler has not formally been sentenced by the Court.

3. Admitted as stated. The answer to paragraph 2 is incorporated by reference as though fully set forth at length.

4. Denied. Defendant denies each and every factual allegation set forth in paragraph 4 and demands strict proof thereof at the time of any hearing. Defendant further denies that Exhibits A and B have any probative evidentiary value, relevance or materiality and denies the accuracy of the information contained in said Exhibits. The remaining allegations are conclusions of law.

5-7. The quoted sentences in paragraphs 5 and 7, and the averments in paragraph 6 contain pure conclusions of law as to which no responsive pleading is required. Defendant denies that these conclusions of law are relevant to the instant case. On the contrary,

defendant alleges that these conclusions of law are not precedental in this matter.

8-9. Denied in part and admitted in part. The answer to paragraphs 5 to 7 inclusive are incorporated by reference as though fully set forth at length. Defendant admits that, since this is a death case, his post-trial motions should be heard and decided on their merits by this Court. Since a threshhold determination which must be made before addressing the sufficiency and applicable death penalty questions is whether defendant's pre-trial motions and the trial itself were free of error, then necessarily this Court must hear and decide all post-trial claims before deciding the secondary areas of inquiry. Logic compels this conclusion since only if this Court determines that no error occurred at the pre-trial or trial stages may this Court then address the challenges raised to the sentencing verdict stage. To do otherwise would be to assess the sentencing verdict stage in a vacuum, without regard to the pre-trial and trial stages which were necessary components.

WHEREFORE, defendant respectfully requests that this Court deny the Commonwealth's Petition in toto and hear and decide all of defendant's post-trial claims on the merits.

Respectfully submitted,

/s/_____
NANCY D. WASSER
Counsel for defendant
Joseph Kindler

Dated: October 15, 1984

VERIFICATION

NANCY D. WASSER, hereby verifies that the facts set forth in the foregoing DEFENDANT'S ANSWER TO COMMONWEALTH'S PETITION TO DISMISS DEFENDANT'S POST-VERDCIT MOTIONS are true and correct to the best of her knowledge, information and belief. I understand that this verification and the facts herein alleged are subject to the penalties provided by 18 Pa.C.S. §4904 (unsworn falsification to authorities).

/s/ _____
NANCY D. WASSER

Dated: October 15, 1984

* * *

[CERTIFICATE OF SERVICE OMITTED
IN PRINTING OF THIS APPENDIX]

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

TRIAL DIVISION
CRIMINAL SECTION

AUGUST TERM, 1982
BILLS 2747-2752

[Filed October 23, 1984]

COMMONWEALTH OF PENNSYLVANIA)
)
v.)
)
JOSEPH J. KINDLER)
)

ORDER

AND NOW, to wit, this 23RD day of October, 1984, upon consideration of the Petition attached hereto and those arguments submitted by counsel for the parties, and on the record of the evidentiary hearing completed this date, it is hereby ORDERED and DECREED that all Post-Verdict Motions filed on behalf of defendant JOSEPH J. KINDLER are dismissed by reason of his escape from lawful custody and current status as a fugitive from justice.

BY THE. COURT :

s/ Geisz

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT
CRIMINAL TRIAL DIVISION
PHILADELPHIA, PENNSYLVANIA

AUGUST TERM, 1982
NOS. 2747-2752

[Dated October 3, 1991]

COMMONWEALTH OF PA.	)
	)
vs.	)
	)
JOSEPH J. KINDLER	)
	)

BEFORE: THE HONORABLE JOHN A. GEISZ , J.

Thursday, October 3, 1991

Post-Verdict Motion

Courtroom 653
City Hall
Philadelphia, Pennsylvania

APPEARANCES:

DAVID WEBB, ESQUIRE
GEORGE LEONE, ESQUIRE
Assistant District Attorneys
Representing the Commonwealth

NANCY WASSER, ESQUIRE
Representing the Defendant

[p.2] MR. WEBB: David Webb for the Commonwealth and with me is George Leone from the district attorney's office as well.

As this Court knows, we are here in the matter of Commonwealth versus Joseph Kindler. We are near formal sentencing as a result of the death penalty imposed by the jury in the City and County of Philadelphia on the 16th of November, 1983. The defendant has been convicted for the killing of David Bernstein. He was also convicted of kidnapping, conspiracy as well.

The Commonwealth would move for sentencing at this time, Your Honor.

MS. WASSER: Nancy Wasser for Mr. Kindler.

As you know, the jury simply made a recommendation of death. They did not impose a death sentence. I filed supplemental post-verdict motions and Mr. Alva, trial counsel, filed post-verdict motions as well, challenging in part the imposition of the death penalty in this case for a number of reasons. I listed twenty separate issues, and Mr. Alva listed eight, with sub-issues.

I believe that although you dismissed the post-verdict motions back in 1984 on the basis Mr. Kindler was a fugitive, since he is no longer a [p.3] fugitive, it would be appropriate for the Court, given this is a death case, and given the substantial issues raised concerning not only the trial itself, but concerning the propriety of the imposition of the death sentence in this case, that Your Honor review those post-trial motions. And therefore, in this case, I am

prepared to argue the post-trial motions now, if Your Honor would allow me to be heard. And to continue the case for consideration of those.

Then, if Your Honor determines that it is appropriate, to sentence Mr. Kindler -- to sentence him at that point.

THE COURT: Your request to reinstate post-verdict motions is denied.

MR. WEBB: Thank you.

MS. WASSER: In addition, Your Honor, as you know, Your Honor has granted me permission as court appointed counsel, to withdraw after today's proceedings. Mr. Kindler has, as I said, substantial issues to raise. Not only concerning the trial, but concerning the death penalty phase in this case.

Mr. Peruto has indicated that he would be in a position to enter an appearance if he could [p.4] have a continuance of a period of approximately thirty days for sentencing. There are serious issues that have to be considered and Mr. Peruto is, at this point, not familiar enough with the case to put himself in the position to be able to argue those to Your Honor.

Given that this case, and the precedent that will be set by this case, has never been addressed by the Pennsylvania Supreme Court before, let alone a Common Pleas judge, I would ask the Court to consider granting a continuance so that the interest of justice would best be served and so Mr. Kindler -- so he could have counsel who could be adequately prepared during the post-sentence stage.

THE COURT: May I hear from the Commonwealth?

MR. WEBB: The Commonwealth's position is that the Commonwealth has no opposition to Ms. Wasser withdrawing upon the completion of sentencing here today. The Commonwealth is ready to move to sentencing and that is our position for the last seven years. We have no opposition to her withdrawing upon completion, but not before completion. The Commonwealth moves to [p.5] sentencing.

THE COURT: Your request for continuance is denied.

MS. WASSER: The third request, if the Commonwealth is concerned, as they have expressed in the past, that Mr. Kindler remains in Philadelphia while an unsentenced prisoner, I would ask the Court to order he be removed from Philadelphia and housed in a state correctional institution pending either the determination of post-trial motions or Mr. Peruto to review this case for the purposes of then appearing before Your Honor for a sentencing hearing.

MR. WEBB: The Commonwealth will ask the Court to immediately remove Mr. Kindler upon completion of sentencing to the state correctional institution with the Sheriff's Department, who is prepared to do that today, and again, at the completion of sentencing today.

THE COURT: This Court rules that upon completion of sentencing today, the defendant will be immediately taken by the sheriff to the state

correctional institution and he will be removed from the Philadelphia jurisdiction.

MS. WASSER: Thank you, Your Honor.

[p.6] I think we have a matter of a bench warrant outstanding.

THE COURT: April 29, 1988, a bench warrant was issued for administrative purposes. And the defendant had been missing for some time.

After a hearing on October 10 -- I'm sorry, October 23, 1984, the Court made the findings as follows:

That the Court found and observes that after further investigation, the defendant is missing. The Court has observed photos of the defendant and recognizes that the person depicted in the photo is indeed the defendant.

The defendant was sent to the Detention Center to be kept in maximum security division. The Court, therefore, finds that the defendant did voluntarily remove himself from the Detention Center by escaping and loses all legal rights and privileges for post-trial motions. The motion to arrest judgment and for a new trial are denied. Formal sentencing for death is continuing until further notice.

The defendant having been present in the trial and is recognized as the defendant, Joseph J. Kindler, the bench warrant is withdrawn.

[p.7] MR. WEBB: Thank you, Your Honor.

THE COURT: We will now proceed with the sentence.

Mr. Joseph J. Kindler, you have been adjudicated guilty by this Court under the -- based on the verdicts of the jury which are as follows:

On bill 2747, charged with kidnapping, a felony in the first degree, and the victim was David Bernstein, then 20 years old, the verdict by the jury on November 15, 1983 was guilty.

On bill 2748, criminal conspiracy, section 903 of the Crimes Code, on November 15, 1983 the jury returned with a verdict of guilty. And the co-conspirators were Scott Shaw and Michelle Raifer. The criminal conspiracy, the criminal objective was murder, and the overt act did strike the victim.

On bill 2750, you were charged with murder in the first degree under section 2502. On November 15, the jury returned with a verdict of guilty of murder in the first degree on November 15, 1983. And the jury then heard testimony on the death penalty, and after deliberations, the jury returned a finding of two aggravated circumstances which are set forth, and set the [p.8] penalty for death. The aggravating circumstances were as follows:

That the victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceedings involving such offenses. And, the defendant committed a killing while in the

perpetration of a felony. And that was signed by all members of the jury.

We will proceed with the sentence on the murder bill, 2750, which the jury returned a verdict of the death penalty.

Now, based on that verdict, the sentence of the law is that you, Joseph J. Kindler, be taken by the sheriff of Philadelphia County, to the jail of that county, from whence you came and from -- and from thence, in due course, to the state correctional institution at Rockview in Center County, Pennsylvania. And that you will there suffer death during the week affixed by the governor of the Commonwealth in a building erected for the purpose on land owned by the Commonwealth. Such punishment being inflicted by either the [p.9] warden or the deputy warden of the state correctional institution or by such person as the warden shall designate by causing to pass through your body a legal injection of intensity sufficient to cause death. May God in his infinite goodness have mercy on your soul.

On bill 2748, criminal conspiracy, I sentence the defendant to a term in the state correctional institution of not less than five and not more than ten years in the state correctional institution. That is under section -- a violation of section 903 of the Crimes Code. And that that sentence will run at the same time or run concurrent to the sentence imposed on the bill 2750.

Now, bill 2747, kidnapping by force. On that bill, I sentence you to not less than ten years and not more than twenty years in the state correctional institution

and that bill will commence and will be consecutive to the sentence imposed on 2750, the murder bill.

The reason for that is the crimes occurred at different times and the evidence that I remember was after the defendant was kidnapped and taken away, he was taken some several miles [p.10] in a car, and that it occurred at different times than when the actual homicide occurred. That will be as I said, consecutive to the bills, to the sentences imposed on bill 2750 and 2748.

Do you have anything further to consider?

MS. WASSER: I would simply ask that Your Honor direct the Commonwealth of Pennsylvania inquire and obtain all information concerning credit Mr. Kindler is to receive for whatever period of time he was incarcerated in Canada.

MR. WEBB: He was a fugitive from the jurisdiction of Pennsylvania. We would be opposed to any credit for any time served outside the jurisdiction.

THE COURT: I agree.

MS. WASSER: He was a prisoner in Canada as a result of the charges from this court. In the same way if he had been in another state in this country. And I would ask that he be given credit for the time that he spent incarcerated which directly results from time from this case.

THE COURT: The Court would not recognize any time served any place outside the [p.11] jurisdiction of Pennsylvania.

I am sure some appellate court does disagree with me, they will be sure to tell me about it.

There is also a mandatory fine of $30. $15 to the Victim's Compensation Fund and $10 to the Domestic Abuse Fund, and $5 to the Commonwealth's Judicial Computer, the Commonwealth's Computer Fund.

MS. WASSER: It is a small point, but I believe all the fines came into effect well after the crimes for which Mr. Kindler was convicted. And I believe there is -- there may be a small fine that would be involved. But, all of those are relatively recent vintage. And it would not be the same fines that would be imposed.

MR. WEBB: I believe it would be. These came into being prior to the imposition of sentence here today, which is the operative time we are looking at in terms of the fines that should be imposed.

MS. WASSER: It's the statute for sentencing, Judge.

THE COURT: Do you agree the fine of $30 should not be imposed?

[p.12] MR. WEBB: I think it should be imposed.

THE COURT: Yes, it will be imposed.

Do you have an application?

MS. WASSER: If we are done with the proceedings, yes. I would ask permission to withdraw.

MR. WEBB: I believe the defendant has a right to make a statement or he may waive that right, if he so desires.

MS. WASSER: Prior to sentencing he has that right.

THE COURT: I am not sure what the application is.

MS. WASSER: I simply requested permission to withdraw as counsel in the case. Your Honor indicated when Mr. Kindler was sentenced, that Your Honor would permit me to withdraw as counsel in the case.

THE COURT: Do you have any objection?

MR. WEBB: I have no objection. Mr. Kindler has a right to make a statement here today, if he so desires. If he wants to waive that, he can. These proceedings are not over yet. He does not have to say anything. But, he has the opportunity to. If he doesn't want to, [p.13] he can waive that.

THE COURT: You have the right of elocution, Mr. Kindler.

MS. WASSER: Mr. Kindler has nothing he wishes to say to the Court at this time.

THE COURT: Very well. Your application to withdraw as defense counsel, Ms. Nancy Wasser, is granted.

You have a period of 30 days to appeal the case to the Supreme Court of Pennsylvania, and that is a

mandatory right of appeal under section 1941 of the Appellate Rules of Procedure. And that completes the sentencing.

MR. WEBB: If I may, a couple of other things.

I want to make sure Mr. Kindler understands he has the right to file post-sentence motions within ten days of today. So he has all the rights and he has a right to have counsel do that for him. If he does not have counsel, as Ms. Wasser will withdraw, counsel will be appointed for him if he cannot afford Mr. Peruto.

THE COURT: The ruling still stands. By escaping from the Commonwealth and under all the circumstances, he has lost his right to post- [p.14] trial motions and to any reinstatement of them at this time.

MR. WEBB: I was talking about post-sentencing motions. He has ten days from today to file post-sentencing motions, arguing the propriety of the sentence imposed by the Court so he understands that.

THE COURT: Your request to advise him of his right to file post-trial motions within ten days is denied. He has already lost those rights by my ruling as of November 23, 1984.

MR. WEBB: Those are post-sentence rights, but very well.

THE COURT: Have you understood everything I have said, Mr. Kindler?

THE DEFENDANT: Yes.

THE COURT: You have understood everything I have said today?

THE DEFENDANT: Yes.

THE COURT: Do you want anything explained to you at this time?

THE DEFENDANT: No, I don't.

THE COURT: Very well. I remand the defendant to the custody of the sheriff.

MS. WASSER: May Mr. Kindler remain in the [p.15] courtroom for a few moments? His parents are here.

MR. WEBB: The Commonwealth is opposed to the defendant remaining anyplace for any longer than necessary. We want him out of the jurisdiction and into the state now.

THE COURT: Remand him. Your request is denied and I remand him to the custody of the sheriff.

(Whereupon the proceedings were concluded at 2:30 P.M.)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT
OF PENNSYLVANIA

CRIMINAL TRIAL DIVISION

AUGUST TERM, 1982

2747 - KIDNAPPING-FORCE, THREAT OR DECEPTION

2748 - CRIMINAL CONSPIRACY

2750 - MURDER, VOLUNTARY MANSLAUGHTER

SUPREME COURT # 155 E.D.
APPEAL DOCKET 1991

[Filed February 28, 1992]

COMMONWEALTH OF PENNSYLVANIA)
)
VS)
)
JOSEPH KINDLER)
)

OPINION

CLARKE, JR., E. H., J.

On July 25, 1982, the body of David Bernstein was discovered in the Delaware River. An autopsy revealed that the victim died from a beating inflicted with a blunt instrument and drowning. A warrant for the

defendant's arrest was issued on July 25, 1982 and he was taken into custody.

The case was assigned to the Honorable John J. Geisz , Judge on September 6, 1983 for trial. A motion to suppress hearing was held on October 19, 1983.

Following jury selection, the defendant was arraigned on October 24, 1983 and trial began. The jury returned guilty verdicts to all charges and on the Murder bill, found it to be in the First Degree.

That same jury, after a penalty hearing, sentenced the defendant to death.

Post-verdict motions were filed but, trial counsel withdrew his representation before they were heard. New counsel was appointed and filed supplemental post verdict motions on July 16, 1984.

On October 10, 1984, the Commonwealth filed a Petition to Dismiss Defendant's Post Verdict Motions because he had escaped from custody. A hearing was held on October 23, 1984 and, witnesses were presented. At the conclusion of that hearing, Judge Geisz, determined that the defendant had voluntarily removed himself from the Detention Center by escaping and ordered the Motions for a New Trial and/or Arrest of Judgment dismissed. Formal sentencing was continued.

On April 29, 1988, a bench warrant was issued by Judge Geisz for administrative purposes. The court ordered that upon apprehension the defendant must appear before Judge Geisz for a hearing.

That hearing was held on October 3, 1991. At that time, the defendant petitioned to reinstate his post verdict motions which was denied. The bench warrant was withdrawn and the defendant was formally sentenced.

A sentence of ten (10) to twenty (20) years consecutive to the Murder bill was imposed on Bill 2747 (Kidnaping) and a concurrent five (5) to ten (10) years was imposed on Bill 2748 (Conspiracy). A sentence of death by lethal injection was imposed on the Murder bill, #2750. Defense counsel was permitted to withdraw her appearance after the sentencing.

On October 22, 1991, the defendant filed a pro se notice of appeal to the Supreme Court of Pennsylvania.

For administrative purposes, the case was transferred to this Court for the preparation of an opinion on behalf of fellow Judge Geisz.

In ruling that the defendant's post-trial motions were denied, Judge Geisz was following the law of this Commonwealth which states, "... the trial court ... was without discretion in denying defendant's post-verdict motions as long as he remained a fugitive outside the court's jurisdiction." Commonwealth v. Clark, 300 PaS 315, 446 A.2d 633 (1982). U.S. Cert. denied, 110 S.Ct. 3229. (See Commonwealth v. Morrison, __ Pas __, 483 A.2d 566 (1984): ". . . appellant was beyond the control of the jurisdiction for seven and one-half months; consequently, the trial judge did not abuse his discretion in dismissing appellant's post-verdict motions.").

'Subsequently, however, upon the defendant's apprehension, he motioned the court to consider his post-verdict motions (defendant in effect requested that the court permit reinstatement of his motions). (see N.T. 10/3/91 at 2-3). That request was denied and formal sentencing then took place.

As noted in Commonwealth v. Clark, supra, the standard for review is whether the trial court abused its discretion in declining to reinstate post-trial motions.

While this Court feels the better practice would have been to consider the post-verdict motions, particularly in light of the death sentence imposed, it cannot in good conscience find that Judge Geisz abused his discretion.[1]

In Clark, citing Commonwealth v. Boyd, 244 PaS 98, 366 A.2d 934 (1976), the court stated:

> "A defendant who runs away after having been convicted of the charge or charges against him waives his right to a judicial review of his case. If he thereafter returns it is a matter of discretion of the court whether or not the

---

[1] This Court notes that the Commonwealth was not entirely confident in this request. In their petition they stated, "However, if this Court deems unwaivable those claims attacking the death penalty and the sufficiency of the evidence to sustain this capital conviction, (cites omitted), the Commonwealth alternatively urges the Court to dismiss defendant's post-verdict motions as to all but the penalty and sufficiency issues." Commonwealth petition to Dismiss, P. 3, para. 9.

circumstances justify a reinstatement of his post-trial motions or applications."

"An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality prejudice, bias or illwill, as shown by the evidence or the record, discretion is abused." Commonwealth v. Niemetz, 282 PaS 431, 433 A.2d 1369 (1980).

Judge Geisz's order denying defendant's motion to reinstate post-verdict motions did not amount to an abuse of discretion.

BY THE COURT:

/s/ Eugene H. Clarke
J.

DATED: FEBRUARY 28, 1992

IN THE SUPREME COURT OF PENNSYLVANIA

E.D. APPEAL DOCKET, 1991
No. 155

[Filed June 17, 1992]

COMMONWEALTH OF PENNSYLVANIA	)
	)
vs.	)
	)
JOSEPH KINDLER, APPELLANT	)
	)

BRIEF AND REPRODUCED RECORD FOR APPELLANT

Appeal from the Judgment of Sentence of Death and Terms of Imprisonment of the Court of Common Pleas of Philadelphia County, CP 82-08-2747-2752, wherein Appellant was formally sentenced by the Honorable John Geisz, Judge of the Common Pleas Court of Philadelphia, on October 3, 1991.

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STATEMENT OF JURISDICTION

This is a direct appeal from a Judgment of Sentence in a criminal case before the Court of Common Pleas of Philadelphia County wherein the Appellant Joseph Kindler was sentenced to the death penalty and to terms of imprisonment. Accordingly, this Court has direct appellate jurisdiction pursuant to 42 C.P.S.A. Section 9711(h).

STATEMENT OF THE QUESTIONS PRESENTED

1. Was the Appellant denied effective assistance of trial counsel where trial counsel failed to consider with Appellant that trial counsel should be a witness rather than an attorney for Appellant?

2. Did the prosecutor commit prosecutorial misconduct in his closing speech to the jury?

3. Were prior counsel ineffective in failing to object to the inadequate instruction regarding who or what was an accomplice for the Commonwealth in this case?

4. Was the evidence sufficient to establish the aggravating circumstance that this killing occurred in the course of a kidnapping?

5. Was the evidence sufficient to prove the aggravating circumstance that the victim was a prosecution witness who was killed for the purpose of preventing his testimony?

6. Did the prosecutor err in his closing speech to the jury seeking the death penalty?

7. Did the lower court mislead the jury into believing that a finding of mitigating circumstances must be the result of a unanimous verdict?

8. Did the lower court err in failing to define the term "preponderance of the evidence" with respect to mitigating circumstances?

9. Did the lower court err in failing to find as a matter of law that the Appellant had established the mitigating circumstance that he had no significant history of prior criminal convictions?

10. Was Appellant denied effective assistance of counsel for the failure to preserve and advance the death penalty issues presented in this appeal?

11. Should this matter be remanded to the lower court for a full determination of issues raised herein where the lower court abused its discretion in refusing to hear Post-Verdict Motions subsequent to Appellant's recapture?

STATEMENT OF THE CASE

On July 24, 1982, an individual named David Bernstein was killed in Philadelphia. The Appellant Joseph Kindler, along with a Co-Defendant named Scott Shaw, was arrested and charged with this Criminal Homicide along with the offenses of Kidnapping and Conspiracy as per August Sessions 1982, Nos. 2750, 2747 and 2748 respectively.

At time of trial, the Appellant was represented by Daniel-Paul Alva, Esquire.

The case was assigned to the Honorable John Geisz, Common Pleas Court Judge of Philadelphia. On October 19, 1983, Judge Geisz heard and denied a Pre-Trial Motion to Suppress Evidence. On October 24, 1983, the Defendant was arraigned and pled not guilty to these three charges. Jury selection began and the jury was selected by November 2, 1983.

The jury trial concluded on November 15, 1983 when the jury returned the verdict of guilty of Murder of the First Degree, Kidnapping and Conspiracy.

On November 16, 1983, the jury heard testimony on the question of penalty and returned with a verdict of death. Attached herewith as Exhibit "A" is a true and correct copy of the First Degree Murder Verdict Penalty Determination Sheet (3 pages).

On November 28, 1983, trial counsel filed a Motion for a New Trial for the Lower Court, a true and correct copy of which is attached hereto as Exhibit "B" (4 pages).

On March 16, 1984, Judge Geisz granted the motion of trial counsel to withdraw as attorney for the Defendant because his inability to pay for legal fees.

On July 16, 1984, new counsel, Nancy D. Wasser, Esquire, filed Supplemental Post-Verdict Motions in Support of a New Trial and/or an Arrest of Judgment and/or the Imposition of a Sentence of Life Imprisonment, a true and correct copy of which is attached hereto as Exhibit "C" (9 pages).

On October 10, 1984, the Commonwealth filed a Petition to Dismiss Defendant's Post-Verdict Motions

with the lower Court, a true and correct copy of which is attached hereto as Exhibit "D" (4 pages), in which the prosecution alleged that the Defendant escaped from confinement on September 20, 1984. Attached hereto as Exhibit "E" is a true and correct copy of Defendant's Answer to Commonwealth's Petition to Dismiss Defendant's Post-Verdict Motions (5 pages), which was filed on behalf of Appellant by his counsel on October 15, 1984.

On October 23, 1984, following an evidentiary hearing, Judge Geisz entered an Order, a true and correct copy of which is attached hereto as Exhibit "F", dismissing all Post-Verdict Motions by reason of Appellant's status as a fugitive.

A hearing was convened before Judge Geisz on October 3, 1991 subsequent to Appellant having been apprehended in Canada and returned to the United States to deal with the present proceedings. At that time, Post-Verdict Motion counsel for the Appellant moved that Judge Geisz permit the reinstatement of Post-Verdict Motions since the Appellant was no longer a fugitive from justice. Judge Geisz denied this request and proceeded to formally sentence the Appellant on Bill No. 2750, in which the Appellant had been convicted of Murder of the First Degree, to death by lethal injection and on Bill No. 2747, in which the Appellant had been convicted of Kidnapping, to a term of imprisonment of not less than ten not more than twenty years to run consecutively to the sentence imposed on Bill No. 2750, and on Bill No. 2748, in which the Appellant had been convicted of Conspiracy, to a term of not less than five not more than ten years imprisonment to run concurrently with the sentence

imposed on Bill No. 2750. The Trial Judge also granted Ms. Wasser's Petition to Withdraw from the case.

On October 22, 1991, the Appellant filed a Notice of Appeal pro se to this Honorable Court, a true and correct copy of which is attached hereto as Exhibit "G" (2 pages).

On October 30, 1991, present counsel entered his Appearance with the Supreme Court of Pennsylvania, a true and correct of which Entry of Appearance is attached hereto as Exhibit "H" (2 pages).

Attached hereto as Exhibit "I" is a true and correct copy of the docket entries of this action before the Court of Common Pleas of Philadelphia County (7 pages).

Attached herewith as Exhibit "J" is a true and correct copy of the Opinion offered on behalf of the Lower Court by the Honorable Eugene H. Clarke, Jr., Common Pleas Court Judge of Philadelphia County, dated February 28, 1992 (4 pages).

SUMMARY OF THE ARGUMENTS

Appellant contends that his trial attorney should have discussed with him the option of having counsel testify on his behalf as a witness, rather than act as his attorney, where the Commonwealth relied upon testimony that Appellant knew through his counsel that the deceased was going to testify against him in Montgomery County regarding a burglary. Trial counsel's closing speech to the jury revealed that he would have been in a position to contradict the Commonwealth regarding Appellant's alleged

knowledge of an immunity Order imposed upon the deceased, which was the basis of the Commonwealth's contention that Appellant realized that the deceased was compelled to testify regarding that burglary case. Appellant's counsel's failure to appear in Montgomery County for a hearing on a pre-trial Motion, where the deceased was supposed to testify pursuant to the immunity grant, supported the Commonwealth's closing argument to the jury that the homicide of the deceased on the following day was the result of Appellant's attempt to eliminate a witness. Counsel's testimony could have explained that there was no plan to avoid attending that hearing since Appellant was not informed that the deceased was compelled to testify pursuant to an immunity Order.

In his closing speech to the jury, the prosecutor suggested that the jury should resolve any doubts about the case by returning a guilty verdict because an error on the side of acquittal would be irreversible and further improperly referred to the fact that the deceased would not be here to testify.

Prior counsel were ineffective in failing to object to the inadequate corrupt source instruction which failed to identify who was the "accomplice" upon whom such credibility standards should be applied, and failed to define for the jury the meaning of the term "accomplice" in view of the absence of a statement identifying that person. This was especially prejudicial where the critical testimony implicating Appellant came from Michelle Raifer, a witness who had allegedly aided the Appellant in the commission of this criminal homicide and who received a substantial plea bargain to her benefit.

The sentence of death in this case should be vacated because the evidence did not establish beyond a reasonable doubt the presence of either of the two aggravating circumstances found by the jury, to wit, that the killing occurred in the course of the commission of a kidnapping or that the victim was killed so as to prevent his testimony in a criminal proceeding against the Appellant.

In the prosecutor's closing speech at the death penalty hearing, he improperly referred to religious law and appealed to the jury to return a death sentence on emotional grounds, including an argument that a death sentence would make the jury feel good afterwards, based on his own experience.

The manner in which the trial Judge instructed the jury, particularly with respect to a response to a question from the jury, regarding a finding of mitigating circumstances improperly suggested to jury that such a finding would have to be unanimous.

The sentencing hearing was further marred by the failure of the trial Judge to define the term "preponderance of the evidence" which the Court had said was the standard of proof for the Defendant in establishing mitigating circumstances.

Appellant also complains of the failure of the sentencing Judge to find as a matter of law, and to so instruct the jury, that the Appellant had established the existence of a mitigating circumstance in that he had no significant history of prior criminal convictions, which was undisputed at the sentencing hearing.

Finally, Appellant would not object to a remand to the lower court for a full resolution of the issues presented herein and contends that the lower Court abused its discretion in refusing to reinstate Post-Verdict or Post-Sentence Motions following Appellant's recapture.

ARGUMENT

I. THE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL BECAUSE APPELLANT WAS PREJUDICED WHERE TRIAL COUNSEL FAILED TO REVIEW WITH APPELLANT THE OPTION THAT TRIAL COUNSEL COULD HAVE BEEN A WITNESS FOR APPELLANT RATHER THAN HIS ATTORNEY.

The following issue regarding the ineffectiveness of trial counsel in failing to be a witness for the Appellant is a matter which was not raised in the lower Court by either trial counsel himself or by Post-Verdict Motions counsel at the level of proceedings wherein she represented this Appellant. However, because this is a case involving the Death Penalty wherein this Court has traditionally permitted a relaxed standard of waiver, Commonwealth v. Pirela, 507 A.2d 23 (Pa., 1986), Commonwealth v. Zettlemoyer, 454 A.2d 937 (Pa., 1982), Appellant respectfully submits that this Honorable Court should consider this contention now raised by new counsel on direct appeal. Furthermore, to the extent that this claim should have been raised by Post-Verdict Motions counsel, Appellant respectfully submits that he would have been deprived of the effective assistance of counsel to which he was constitutionally entitled at that level of these

proceedings as well. Commonwealth v. Pierce, 527 A.2d 973 (Pa. 1987); Strickland v. Washington, 104 S. Ct. 2052 (U.S, 1984).

This case arises from a burglary which allegedly occurred in Montgomery County of a business known as Sound Odyssey on April 4, 1982, in which it was alleged that the Appellant was involved along with codefendant Scott Shaw and the decedent, David Bernstein. On April 5, 1982, Bernstein purportedly agreed to testify in that burglary case on behalf of the prosecution and against Shaw and Kindler. On the same date, a search warrant was issued in Philadelphia for the apartment of the Appellant, at which time Appellant was arrested on those burglary charges. On April 14, 1982, a preliminary hearing was held in Montgomery County, at which time the Appellant was held for Court; however, at the hearing, Bernstein did not testify as a Commonwealth witness.

On May 13, 1982, Daniel-Paul Alva, Esquire, trial counsel for the Appellant in this case, who was representing the Appellant in the Montgomery County burglary case, filed a Motion to Quash the preliminary hearing.

On May 21, 1982, the Court of Common Pleas of Montgomery County, acting in accordance with the request of the District Attorney of Montgomery County, granted a Petition to Immunize Mr. Bernstein.

On July 9, 1982, the Honorable Mason Avirgian of the Common Pleas Court of Montgomery County apparently dismissed the Defendant's Motion to Quash without prejudice.

On July 23, 1982, the aforesaid Motion to Quash was again listed, this time before Judge William Nicholas in Montgomery County Court of Common Pleas. At that time, Mr. Bernstein was present along with his lawyer, Martin King, Esquire, and was supposedly prepared to testify against the Appellant, as he had been granted the aforesaid immunity. Because neither Mr. Alva nor Appellant appeared on July 23, 1982, Judge Nicholas dismissed the Motion to Quash. It was on the following day, July 24, 1982 (actually the morning of July 25, 1982 at 2:45 a.m.) that Mr. Kindler was allegedly killed by the Appellant and his codefendant Scott Shaw.

At the trial of this case, it was brought out in the Commonwealth's case in chief through the testimony of Assistant District Attorney of Montgomery County Gary Silo, Esquire, and Martin King, Esquire, Bernstein's defense attorney in the Montgomery County burglary case, that the Commonwealth intended to use Bernstein's testimony, should he testify at the hearing on Appellant's Motion to Quash on July 23, 1982 against the Appellant at trial in the event that Bernstein should not be available to testify at Appellant's trial (N.T. 11/83, 90, 126). Because neither Appellant nor Mr. Alva appeared, no testimony was given by Bernstein at that time.

Mr. Silo told the jury that Mr. Alva "might know of" Bernstein having been granted an immunity which would have compelled Bernstein's testimony at the hearing on Mr. Alva's Quash Motion (N.T. 11/3/83, 97). Mr. King testified that approximately seven to ten days before the hearing of July 23, 1982, he informed Mr. Alva of his client's intention to testify against Appellant and in fact urged Mr. Alva to withdraw his

Motion to Quash (N.T. 11/3/82, 127-128). Mr. King also testified that he informed Mr. Alva that, on behalf of Bernstein, Mr. King was considering a Federal Court challenge to the Immunity Order (N.T. 11/3/83, 133).

In the defense case in chief, the Appellant presented testimony from a clerk of the Montgomery County Court of Common Pleas to establish that the Motion to Quash, which Mr. Alva had filed on Appellant's behalf on May 13, 1982, had been dismissed on July 9, 1982 by Judge Avirgian without prejudice (N.T. 12/9/83, 56).

In order to deal with the suggestion planted by the Commonwealth that the Appellant had a motive to kill Bernstein in order to prevent his testimony in Montgomery County, Mr. Alva told the jury in his closing speech in this trial that, "We were never told, meaning Mr. Kindler and myself . . ." that Bernstein had been granted the immunity which would have required Bernstein to testify for the prosecution at the hearing on the Motion to Quash in Montgomery County. Mr. Alva stated to the jury, "How were we to know? How was Mr. Kindler to know that this had taken place?" (referring to the Immunity Order). Since Bernstein had refused to testify for the Commonwealth at the preliminary hearing, Mr. Alva argued to the jury that there was no reason for the Appellant and himself, as Appellant's attorney in Montgomery County, to believe that Bernstein was going to have to testify against Appellant at the hearing on the Motion to Quash since, with respect to any Immunity Order, ". . . we didn't know about it" (N.T. 11/14/83, 63-64).

Mr. Alva argued to the jury that he was not present at the Quash Hearing on July 23, 1982 because, as a

clerk testified for the defense, the Motion had been disposed of on July 9, 1983, and not because there was a plan to avoid having Bernstein commit to testimony that he was otherwise compelled to give on July 23, 1982 for the prosecution. Even if there was an Immunity Order, Mr. Alva argued to the jury, Mr. Alva knew from Mr. King that a legal challenge to any Immunity Order would be contemplated for Federal Court on behalf of Bernstein, so that Appellant would have had no motive to murder Bernstein because of a concern that Bernstein would he compelled by virtue of an Immunity Order to give testimony against him (N.T. 11/14/83, 65).

In the prosecutor's closing speech to the jury, it was emphasized that Bernstein was prepared to testify on July 23, 1982, but that no testimony was given because Mr. Alva failed to appear (N.T, 11/14/83, 120-122). As to the defense's knowledge of the Immunity Order, the District Attorney argued that Bernstein's attorney had informed Mr. Alva of the Immunity Order and that this was sufficient notice to Mr. Alva that Mr. Bernstein would have to testify at that hearing.

Following the prosecutor's closing speech, Mr. Alva made an objection that the argument of the District Attorney was improper because the prosecutor in effect testified to the events surrounding the Motion to Quash (N.T. 11/14/83, 165).

According to the Appellant and Mr. Alva, at no time did the Appellant's trial attorney discuss with the Appellant the possibility that the Appellant ought to obtain different counsel for trial and that Mr. Alva should be a witness for the Appellant, consistent with the factual representations made by Mr. Alva to the

jury in his closing speech which emphasized that neither he nor his client knew that immunity had been provided to Bernstein (so that Bernstein would be compelled to testify on July 23, 1982 against Appellant at the hearing on the Motion to Quash). As a result of this sequence, the jury was left with the impression that the failure of Mr. Alva or the Appellant to appear on July 23, 1982 was designed to prevent Bernstein from having been forced to testify, whereupon that testimony against Appellant would have been preserved for trial in Montgomery County on the burglary charge. Thus, the alleged homicide of Bernstein on July 24, 1982 was represented as an intentional act designed to silence a Commonwealth witness.

Under the Code of Professional Responsibility, DR 5-101 and 5-102, a lawyer is not to undertake representation of a Defendant if it is obvious that he ought to be called as a witness. Under these rules, when a lawyer learns that it is obvious that he ought to be called as a witness on behalf of his client, ". . . he shall withdraw from the conduct of the trial . . .". See Miller v. Devine, 421 F. Supp. 1020 (W.D. Pa., 1976) and Commonwealth v. Floyd, 431 A.2d 984 (Pa., 1981). In this case, Mr. Alva made no effort to consult with his client as to the viability of his being a witness to contradict the testimony of Mr. Silo or Mr. King.

Appellant respectfully submits that he was deprived of the effective assistance of counsel to which he was entitled under the federal and state constitutions because the use of Mr. Alva as a witness was a claim of arguable merit that was omitted without any reasonable basis designed to advance the interest of Appellant at trial, to the prejudice of

Appellant, in the sense that the outcome of the proceedings may well have been different. Apparently, it was very important to the Commonwealth's case to present testimony from Mr. Silo and Mr. King to establish the motive of the Appellant based upon these facts.[1]

Accordingly, the Appellant respectfully submits that this Honorable Court should either reverse the judgment of sentence in this case and order a trial, or, in the alternative, should vacate the judgment of sentence and remand this matter back to the Court of Common Pleas of Philadelphia County for an evidentiary hearing to determine the questions of ineffective assistance of prior counsel, which were not advanced, as has been noted above, by Post-Verdict Motions counsel when the matter was still before the lower Court. At such a remand hearing, Appellant would have the opportunity to create a full record to establish the basis for the requested relief of a new trial.

---

[1] Furthermore, this testimony was relied upon by the Commonwealth in support of its position that the Appellant had committed an aggravating circumstance which warranted the imposition of the death penalty, to wit, that Bernstein was a prosecution witness to a felony committed by the Appellant and was killed for the purpose of presenting his testimony against the Appellant in a criminal proceeding involving the burglary pursuant to 42 C.P.S.A. Section 9711(d)(5).

II. THE PROSECUTOR COMMITTED PROSECUTORIAL MISCONDUCT IN HIS CLOSING SPEECH TO THE JURY.

At the time of trial in this case, the prosecutor made the following argument in his closing speech to the jury (N.T., 11/14/83, 102-103):

> I contrast that with the very important right that all of us have that you right now are in the midst of exercising. And that is the right of the jury to indeed become part of the law enforcement process, the right of the jury to make a decision based on the law that we are all governed by and make immediate and definite to a degree the action that would follow.
>
> By that I would mean whereas at times we may wonder, speculate about what will happen in the future, all of you, the 12 of you, when you do reach a verdict, a result will indeed occur.
>
> Just as if you would find the Defendants not guilty, they would be right in reference to this case to stand up and just leave and never again think about his particular point because they're left, they're gone and there's nothing I can do, the Judge or anybody present to in any way reverse that process.
>
> That, ladies and gentlemen, is the power that all of you have. That's immense. That's awesome and most important. You also have the power, if you were to convict, to in fact render a judgment on facts in accordance with the law with the result occurring, that is, a conviction and of course, there

is -- where there are convictions, possibilities of appeal and reversal and those sorts of things which are strictly legal procedural things, that may be true.

However, to a certain measure, if you should find them guilty, it would be final. But there is no question if they were found not guilty it would be final.

Further along in the prosecutor's closing speech, he argued to the jury that David Bernstein, who was brutally murdered, "cannot possibly testify, since he's dead" and that David Bernstein "will never see 23" (N.T. 11/14/83, 108-117).

Following the prosecutor's closing speech, counsel for the Defendants objected to the District Attorney telling the jury that if there was a verdict of guilty, there might be some type of an appeal, which "might give the jury an out to say, well, if we do something wrong somebody could come along and correct it." (N.T. 11/14/83, 155). In addition, counsel for this Appellant objected to the prosecutor having argued to the jury ". . . that the deceased was not here to testify. Your Honor, that by its very nature implies that if the deceased were here to testify, he would in fact be testifying against the two Defendants . . ." (N.T. 11/14/83, 157).

These contentions of prosecutorial misconduct with regard to the prosecutor's closing speech were raised in Post-Verdict Motions and Supplemental Post-Verdict Motions filed in the lower Court. In any event, because of the relaxed rules of waiver involving death penalty cases, Commonwealth v. Pirela and Commonwealth v.

Zettlemoyer, supra, Appellant respectfully submits that these matters are sufficiently preserved and should be addressed by this Court in direct appeal of this conviction.

In Caldwell v. Mississippi, 472 U.S. 320 (1985) and Commonwealth v. Baker, 511 A.2d 777 (Pa., 1986), it was established that a prosecutor may not attempt to suggest that the jury should resolve any doubts about the case by erring on the side of conviction because an error on the side of acquittal would be irreversible. See Commonwealth v. Abu-Jamal, 555 A.2d 846, 855 (Pa., 1989). Appellant respectfully submits that the instant comments of the prosecutor in his closing speech violated this principle by telling the jury that if it found the Defendant Not Guilty, the Defendant would just "stand up and just leave and never again think about this particular point because they're left, they're gone and there's nothing I can do, the Judge or anybody present to any way reverse that process." The prosecutor in this case went on to discuss that if there is a conviction, there are "possibilities of appeal and reversal . . .". Thus, the prosecutor implied, if the jury should find the accused guilty, it would be final, but only "to a certain measure"; however, if the jury should find the Defendant not guilty, the verdict would be "final". (N.T. 11/14/83, 102-103).

In Commonwealth v. Beasley, 568 A.2d 1235 (Pa., 1990), in footnote 4, this Court adopted a per se rule prohibiting "all remarks about the appellate process in all future trials." Since Mr. Kindler's case is not final and is still pending direct appeal at the time of the decisions in Beasley and Caldwell, Appellant requests that these principles be applied to his case.

Comments about the appellate process directed to the jury during a criminal trial are totally irrelevant to any issue involved in such a proceeding. These sort of remarks create the risk that the jury's sense of responsibility as the ultimate arbiter of the verdict to be decided will be lessened.

Because the prosecutor's remarks in this case violated these principles, and because the prosecutor also improperly told the jury in his closing speech that the victim of the homicide was not here to testify and would never see age 23, the Appellant respectfully submits that he is entitled to a new trial.

In Commonwealth v. Johnson, 532 A.2d 796, 801 (Pa. 1987), this Court once again condemned the tactic of inducing jurors to consider the status of the deceased as a possible witness for the Commonwealth. In that case, the prosecutor told the jury that the mother and family of the deceased "will never see young Kenny again". See also Commonwealth v. Johnson, 533 A.2d 994 (Pa. 1987), where this Court once again reiterated the long-established principle that the content of a summation must relate back to the evidence on record and not to extraneous matters of this nature, particularly because a jury tends to attach special importance to the arguments of an Assistant District Attorney. 533 A.2d at 996.

In view of the prosecutorial misconduct which is discussed herein, the Appellant respectfully prays that he is entitled to the award of a new trial. Where there exists a reasonable possibility that the errors complained of may have contributed to the jury reaching a verdict in the way it did, the error complained of cannot be deemed as harmless beyond a

reasonable doubt. Commonwealth v. Story, 476 Pa. 391 (1978); Commonwealth v. Turner, 454 A.2d 537 (Pa. 1982).

III. PRIOR COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE INADEQUATE INSTRUCTION TO THE JURY REGARDING THE CREDIBILITY OF AN ACCOMPLICE, WHERE THE TRIAL JUDGE FAILED TO IDENTIFY FOR THE JURY WHO WAS AN "ACCOMPLICE" IN THIS CASE OR TO DEFINE THAT TERM FOR THE JURY.

At the trial in this case, the Commonwealth called a witness named Michelle Raifer. Ms. Raifer testified that she participated in the setting up of David Bernstein to be murdered by the Defendants. She testified that on the morning of July 25, 1982, she went to the decedent's apartment along with Appellant and the codefendant, that she lured the decedent out of his apartment, that she kissed him goodbye and that the Defendants then attacked the Appellant. Ms. Raifer also testified that the decedent was placed in the trunk of her car, which Appellant then drove to the Delaware River. At the Delaware River, according to Ms. Raifer, it was the Defendants who then caused the body of the decedent to be placed under water. (N.T. 11/4/83, 40-44).

The Commonwealth also called as a witness Edward Reif, Esquire, attorney for Michelle Raifer, who testified that he negotiated a plea bargain for Michelle Raifer to a charge of Murder of the Third Degree, wherein the District Attorney would make no recommendation to the sentencing Judge (N.T. 11/4/83, 4-7). On cross-examination, Mr. Reif testified that he was hopeful that his client would receive probation

notwithstanding her guilty plea to a Murder of the Third Degree and that it was his view that his client had received "a hell of a deal" (N.T. 11/4/83, 19).

In his final Charge to the jury, the trial Judge stated the following with respect to the issue of accomplice testimony for the Commonwealth:

> I'll explain to you about the testimony where a Commonwealth -- where an accomplice appears as a witness for the Commonwealth.
>
> Experience shows us that after being caught in the commission of a crime, a person may falsely blame others because of some corrupt -- corrupt and wicked motive. On the other hand, such a person may tell the truth about how he and the others committed the crime together.
>
> In deciding whether or not to believe that witness' testimony, you should be guided by the following principles which apply especially to the testimony of an accomplice.
>
> First, the testimony of a witness as an accomplice should be looked upon with disfavor because it comes from a corrupt and polluted source.
>
> Second, you should examine the witness' testimony closely and accept it only with caution and care.
>
> Third, you should consider whether that witness' testimony that the Defendant or the Defendants committed the crime is supported in

whole or in part by evidence other than that testimony, for if it is supported by independent evidence it is more dependable.

Fourth, you may find the Defendant is guilty based on the witness' testimony alone even though it is not supported by any independent evidence.

And so, to summarize, even though you decide that the witness is an accomplice, his or her testimony standing alone is sufficient evidence on which to find the Defendant guilty, if after following the foregoing principles you are convinced beyond a reasonable doubt that that witness testified truthfully and that the Defendant or the Defendants committed the crimes.

(N.T. 11/14/83, 209-210)

While this instruction is technically accurate as far as it goes, the instruction is clearly deficient on two grounds. First, it does not identify who, among the many Commonwealth witnesses, is the "accomplice" upon whom these standards of credibility evaluation should be applied. Trial counsel was under a duty to object to this inadequacy because there was a danger that the jury may have believed that the Judge's instructions referred to codefendant Scott Shaw, who did not testify, especially in view of the accomplice liability charge that the trial Judge had discussed at page 203 of this volume of the notes of testimony. In addition, there was a Commonwealth witness whom the jury might have thought was a subject of an accomplice instruction, but who was not an accomplice under the law, Paula Solomon (See N.T. 11/9/83, 31 et seq). Ms. Solomon had testified that on July 24, 1982,

Appellant showed her a bat, a lead pipe and other paraphernalia associated with the criminal homicide which occurred that evening.

In addition to the error of not identifying who was an accomplice under this instruction, an objection should also have been presented on Appellant's behalf that the charge did not define the term "accomplice". These two omissions go hand in hand since without either a statement of the Court as to who the accomplice instruction is referring to, or a clear definition of an "accomplice" within the confines of that charge, there existed a danger that the jury may fail to apply the rigorous standards provided by the accomplice instruction upon Michelle Raifer, which was critical to the Appellant's right to a fair trial.[2]

It is well established in Pennsylvania law that it is up to the trial Judge to determine who the accomplice is, and not the jury; it is up to the jury, not the trial Judge, to determine, once having been given the

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[2] In the cross-examination of Commonwealth witness Michelle Raifer, counsel for the Appellant brought out that Raifer had developed a personal, sexual relationship with codefendant Scott Shaw. Raifer denied implicating Appellant in order to protect Shaw and also denied defense counsel's suggestion that Shaw told her to implicate Appellant or that Shaw had suggested that Appellant was a "patsy" who could take responsibility for a crime committed by Raifer and Shaw (N.T. 11/4/83, 104, 122). In fact, it was not until the conclusion of Raifer's third statement to the police, following her apprehension, that she finally revealed the involvement of Scott Shaw (N.T. 11/4/83, 141). Thus, there were references in the record from which the jury could have inferred that Scott Shaw, perhaps acting through Michelle Raifer, was attempting to absolve himself of responsibility in this matter by implicating Appellant.

benefit of these legal standards, whether or not to believe the testimony of an accomplice. See Pennsylvania Bar Institute's Suggested Standard Jury Instructions in Criminal Cases, Section 4.01(2). In that Instruction, a trial Judge tells the jury the name of the person whose testimony may be viewed under the accomplice credibility standards. If there is any question about whether or not that Commonwealth witness is an accomplice, the trial Judge is to instruct the jury on the definition of an accomplice, to wit, that this is a person who knowingly and voluntarily cooperates with or aids another in the commission of a crime. When the participation of the witness in the crime for which the Defendant is on trial is clear and undisputed, it is for the Court to determine as a matter of law whether or not that witness is an accomplice. Commonwealth v. Sisak, 436 Pa. 262 (1969); Commonwealth v. Upshur, 488 Pa. 27 (1980).[3]

In Commonwealth v. Bricker, 581 A.2d 147 (Pa., 1990), this Court held that the failure to give a corrupt source charge regarding a prosecution witness was reversible error notwithstanding the Commonwealth's argument that defense counsel had effectively

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[3] For testimony purposes, an accomplice includes not only a candidate for derivative liability under Section 306(c) of the Crimes Code, but also a person who is an active perpetrator of the crime or one upon whom derivative liability could be imposed under the co-conspirator rule. See Subcommittee Note to Section 4.01 of the Suggested Standard Jury Instructions in Criminal Cases. Therefore, the fact that the trial Judge may have defined accomplice derivative liability under Section 306(c) in that part of its Charge dealing with vicarious liability is not a sufficient substitute for the definition of and identity of the accomplice as part of the corrupt source instruction.

cross-examined the witness and had made closing arguments alerting the jury to scrutinize the testimony of that witness carefully and with caution. In discussing this issue and in determining what would have been a proper instruction, this Court stated in footnote 5 of that Opinion that the trial Judge should have identified the accomplice whose testimony was subject to those standards by name ("Kellington").

Although it is true that defense counsel, in his closing argument to the jury, contended that Michelle Raifer should not be believed because she received a favorable plea bargain (N.T. 11/14/83, 73), the duty of instructing the jury as to the law which is to be supplied during their deliberations can neither be delegated to nor usurped by a litigant involved in the trial of the case. Regardless of how effectively Mr. Alva may have argued to the jury that Michelle Raifer was not credible, the trial Judge was vested with the responsibility to instruct the jury that the testimony of Ms. Raifer must be viewed against the standards of an accomplice witness. Therefore, it cannot be assumed that the failure of the trial Judge to give a proper and complete corrupt source instruction in this case did not contribute to the verdict. Commonwealth v. Bricker, supra at 154.

In this case, the Court cannot be assured that the jury applied the standards of the accomplice instruction to Ms. Raifer at all, as they may not have been certain that she was the accomplice to whom Judge Geisz was referring in his instructions. Accordingly, Appellant respectfully submits that there could have been no reasonable basis designed to advance Appellant's interest at the trial for the failure

of trial counsel to lodge an objection to these omissions in the charge regarding an accomplice. That Appellant was prejudiced by this omission is clear in view of the critical role played by Michelle Raifer in implicating the Appellant. Similarly, Post-Verdict Motions counsel, who failed to raise this contention of ineffectiveness with respect to her predecessor, must also be viewed as having provided ineffectiveness of counsel at the Post-Verdict Motions proceedings for these reasons as well.

Accordingly, the Appellant respectfully submits that he is entitled to the award of a new trial.

IV. THE SENTENCE OF DEATH IN THIS CASE MUST BE VACATED

Appellant respectfully submits that there are substantial reasons why the death penalty imposed in the lower Court in this matter should be vacated. Even if this Court were to conclude that Appellant's claims as to trial errors cannot be reviewed because of his past escape, see Argument V, infra, this court will nevertheless review claims regarding the propriety of the death sentence pursuant to 42 C.P.S.A. Section 9711(h), particularly in view of the severity and finality of the sentence of death. Commonwealth v. Roger Judge, No. 104 E.D. Appeal Docket 1987 (May 18, 1982).

A. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE AGGRAVATING CIRCUMSTANCE THAT THIS KILLING OCCURRED IN THE COURSE OF THE COMMISSION OF A KIDNAPPING.

As indicated in Exhibit "A", the First Degree Murder Verdict Penalty Determination Sheet, the jury returned a verdict based upon a finding that the Appellant had committed two aggravating circumstances. One of these two circumstances was that the Appellant "committed a killing while in the perpetration of a felony", in this case, a kidnapping. The Appellant respectfully submits that the Commonwealth's evidence did not prove beyond a reasonable doubt that the Appellant committed a killing while in the perpetration of a kidnapping. 42 C.P.S.A. Section 9711(d)(6).

At the death penalty hearing on November 16, 1983, the prosecutor was granted leave to introduce the entire record of all of the testimony in support of his position as to the presence of aggravating circumstances under the Act. The prosecutor argued to the jury in his opening remarks at the death penalty hearing that the felony in question was kidnapping and the killing occurred during the course of that particular felony (N.T. 11/16/83, 38). The Commonwealth presented no additional testimony or evidence at the death penalty hearing beyond that which was presented at the trial.

In trial counsel's closing speech to the jury at the death penalty hearing, Mr. Alva argued that if David Bernstein had been killed at the hands of his client, it was not a crime which was committed in the course of the kidnapping; rather, counsel contended, any act of kidnapping (for which the Appellant had been found guilty by this jury) was committed in order to carry out the criminal homicide. Thus, this was not a situation where a murder was committed in the course of a commission of a kidnapping (N.T. 11/16/83, 99-100).

The testimony at trial established that David Bernstein was assaulted, allegedly at the hands of the Appellant and his codefendant, outside the door of the decedent's apartment on July 25, 1982 at 2:45 a.m. According to Commonwealth witness Michelle Raifer, the purpose of this assault was to harm Bernstein, not to kidnap him. The subsequent removal of Bernstein from the scene of the initial assault to the Delaware River where Bernstein was subject to being drowned was not carried out for the purpose of committing the felony of kidnapping; rather, the purpose was to complete the plan that the Commonwealth ascribed to this Appellant to kill Mr. Bernstein. Thus, any "kidnapping" which occurred in the course of the commission of that plan was merely incidental to and coincidental with the overall purpose of the criminal homicide of Bernstein, according to the Commonwealth's theory of Appellant's guilt.

In Commonwealth v. Heidnik, 587 A.2d 687 (Pa. 1991), this Court held that evidence was sufficient to establish that the killing of Sandra Lindsay was committed while in the perpetration of a kidnapping. In that case, the victim had been unlawfully removed to Heidnik's residence for the purpose of torture and other criminal conduct; it was only at the end of that period of criminal behavior that Ms. Lindsay was killed by Heidnik. This should be contrasted with the situation in the instant case, where the initial assault attributed to Appellant and his codefendant by the Commonwealth witness was part of a continuous effort to have the decedent's life terminated. Thus, even accepting the Commonwealth's own theory of Appellant's guilt, it is clear that the Commonwealth did not prove beyond a reasonable doubt that the killing of David Bernstein occurred while in the

commission of a felony of kidnapping. Rather, the evidence showed that the converse was the case, ie., that the kidnapping as contended by the Commonwealth occurred in the course of the commission of the attempt to kill Bernstein.

Therefore, the Appellant respectfully submits that the particular aggravating circumstance in question here was not proven beyond a reasonable doubt. Consistent with this Court's decision in Commonwealth v. Robert Wharton, No. 114 E.D. Appeal Docket 1986 (April 28, 1982), wherein the jury's finding of one of three aggravating circumstances was not sustained and this Court remanded for a new sentencing hearing, this Court should vacate the sentence of death imposed in this case and remand the matter to the lower Court for further proceedings, As the United States Supreme Court has said, employing an invalid aggravating factor in the weighing process creates the possibility of randomness, even if other aggravating factors also exist. See Clemons v. Mississippi, 494 U.S. 738, 752 (1990) and Sochor v. Florida, 51 CrL 2127 (U.S., June 8, 1992) (death sentence vacated due to invalid aggravating circumstance, even through other valid aggravating circumstances and no mitigating circumstances found, in order for lower court to conduct a harmless error inquiry).[4]

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[4] While this jury apparently found no mitigating circumstances, Appellant notes that the instructions suggested that the jury must be unanimous before it can find mitigating circumstances (see Argument IV-D, infra); therefore, the absence of such a finding cannot be the basis to conclude that the jury's decision would not have been affected by a failure of proof as to any aggravating circumstance, especially where the Penalty Determination Sheet

B. THE EVIDENCE WAS INSUFFICIENT TO PROVE THE AGGRAVATING CIRCUMSTANCE THAT THE VICTIM WAS A PROSECUTION WITNESS TO A FELONY COMMITTED BY THE APPELLANT WHO WAS KILLED FOR THE PURPOSE OF PREVENTING HIS TESTIMONY IN A CRIMINAL PROCEEDING AGAINST THE APPELLANT.

As with the preceding argument, the Appellant notes that the Commonwealth contended at the death penalty hearing on November 16, 1983 that the record of the trial supported the existence of an aggravating circumstance, to wit, that the victim, David Bernstein, was a prosecution witness to a felony committed by the Appellant and was killed for the purpose of preventing Bernstein's testimony against the Appellant in a criminal proceeding involving that felony, to wit, a burglary in Montgomery County. 42 C.P.S.A. Section 9711(d)(5).

In his closing speech to the jury at the time of the death penalty hearing, counsel for the Appellant argued that the Commonwealth had not proven that Bernstein was in fact a witness for the prosecution, since Bernstein had not testified for the Commonwealth at any proceeding involving the burglary case against the Appellant in Montgomery County. At the preliminary hearing, Bernstein had not taken the stand and there had not been an occasion for Bernstein to testify at any other proceeding in

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indicates that the injury did weigh aggravating versus mitigating circumstances (see Exhibit "A" attached hereto).

Montgomery County. Defense counsel further argued that the Act requires proof that Bernstein was in fact a witness for the Commonwealth, not a mere likelihood that he might testify.

In Commonwealth v. Christy, 515 A.2d 832, 842 (Pa., 1986), this Court held that the Commonwealth had not met its burden of proof in this regard by showing that the Appellant had made a general threat against any possible witnesses against him; rather, the Commonwealth must prove beyond a reasonable doubt that the Appellant killed the witness for the purpose of preventing the testimony of the witness in a criminal proceeding.

This Court has also held that proof of a Defendant's intention to eliminate a witness who was only a potential witness must be established by direct, rather than circumstantial evidence. Commonwealth v. Appel, 517 Pa. 529 (1988). In this case, the Commonwealth only presented circumstantial evidence that the Appellant had slain Bernstein for the specific purpose of eliminating him as a witness in this case. The jury was asked to draw an inference from the fact that Appellant's attorney had withdrawn a Motion to Quash in the Court of Common Pleas of Montgomery County in order to prevent Bernstein from having to give testimony which might be preserved for trial, and that for this reason Bernstein was killed the following day. This circumstantial evidence was offered to establish the alleged motive of the Appellant to kill Mr. Bernstein in order to prevent him from giving testimony in that burglary case. Appellant submits that such circumstantial evidence was not sufficient to establish that the victim was killed to prevent his testimony in a pending criminal

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proceeding, Commonwealth v. Henry, 569 A.2d 929, 937 (Pa., 1990), and therefore, the Commonwealth failed to prove beyond a reasonable doubt that this aggravating circumstance existed on this record.

As in the preceding argument, the Appellant contends that the jury in this case implicitly found the presence of mitigating circumstances when they returned their verdict of death and informed the Judge that ". . . the aggravating circumstances outweighed the mitigating circumstances" (N.T. 11/16/83, 158). As will be argued infra, the Appellant contends that the trial Judge's instructions at the death penalty hearing may have misled the jury into believing that a unanimous vote was required in order to find the presence of mitigating circumstances. Accordingly, the fact that the Penalty Determination Sheet does not indicate the presence of mitigating circumstances should not be deemed a valid bar to a conclusion by this Court that mitigating circumstances could have been found by the jury, had they been properly instructed.[5] Therefore, as in Commonwealth v. Wharton, supra, the Appellant respectfully submits that this Court should vacate the judgment of death and remand the matter for a new hearing because the Commonwealth failed to prove beyond a reasonable doubt that an aggravating circumstance had in fact existed on this record.

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[5] It is noteworthy that on the Penalty Determination Sheet, the jury expressly checked off the block indicating "Yes", indicating that the jury had found that aggravating circumstances outweighed the mitigating circumstances.

C. THE PROSECUTOR EXCEEDED THE BOUNDS OF PROPRIETY IN HIS CLOSING SPEECH BY REFERRING TO THE BIBLE AND THE LAW OF GOD AND BY ASSURING THE JURY THAT THE DEATH SENTENCE WOULD MAKE THEM FEEL GOOD AFTERWARDS.

In his closing speech to the jury at the death penalty on November 16, 1983, the prosecutor stated the following (N.T. 11/16/83, 123-124).

> In reference to aggravating circumstances and mitigating circumstances, what actually are we talking about? First of all, I would ask you to remember, you have heard various things such as believe in the death penalty, That was a -- I heard such things as -- such pointed remarks as if you decide not to seek retribution.
>
> Another phrase was, if you are eager to punish.
>
> Sometimes words and adverbs slipping in, perhaps attempts to place in your mind some kind of feeling of, jeez, maybe I'll do something wrong; am I really that way; or I shouldn't do it because it will make me seem like I'm eager to punish or I'm out for retribution and I don't want it and another thing is if your Christian values say not to come back with the death penalty.
>
> Well, ladies and gentlemen, I in no way and in no case at all, inasmuch as I'm a Christian myself, suggest that there is not an important phase, an important consideration of Christian values. But what we are concerned with now and the

Testament and the Bible will tell you that there is law in the city and there's a law of God.

There is a law of this land and there is a law that we must act through this land, a spiritual law and that being the law of God.

But the law that we are concerned with now, the law that convicted both of these Defendants is not some Christian law, so to speak, but the law of the land which you have got to abide by and apply.

Do not allow the focus of taking a look at the law and applying it to the facts to in any way besmirched or misdirected.

The fact that the law is, the laws are clear.

Further along in the prosecutor's closing speech to the jury during the death penalty hearing, the prosecutor stated the following (N.T. 11/16/83, 144-145):

What I do ask all of you and I mean this sincerely, because I know it is tough, I have been here before and I know and I hear and when I understand that people that find things difficult, feel good afterwards for applying the law.

For recognizing that their part, their positions, their step, in the law enforcement process, was completed. They had done it, the same law that protects the Defendants throughout the trial as properly it should, is the same law that we all must follow in applying the appropriate penalty.

> The law doesn't stop at the trial. And as hard as it may seem, please recognize that when you take the perpetration and the felony, you take, if you find torture, but lastly, when you take the murder of a witness testifying in a criminal proceeding, the very foundation of this country's law and order, are you not necessarily outweighing mitigating circumstances, outweighing it? Thank you very much.[6] (Emphasis supplied).

Appellant respectfully submits that the remarks in question were not within the bounds of oratorical flair permitted in arguments at the sentencing stage; Commonwealth v. Whitney, 512 a.2d 1152, 1158 (Pa., 1986). In Commonwealth v. Henry, 569 A.2d 929, 940 (Pa., 1990), this Court noted that the prosecutorial practice of pushing closing remarks to their lawful limit, and patterning arguments upon remarks that this Court has only narrowly tolerated, is a dangerous practice which the Court strongly discourages.

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[6] The Appellant respectfully submits that his trial counsel should have objected to these remarks concerning the biblical or religious law references, but notes that counsel for the Appellant did object and move for a mistrial because of the latter references regarding a jury would "feel good afterwards for applying the law" (N.T. 11/16/83, 151). In supplemental Post-Verdict Motions filed by Post-Verdict Motions counsel, the claim regarding prosecutorial misconduct in this regard was raised with respect to the same objection that should have been made by trial counsel concerning the reference to the bible and the law of God. As a result of these omissions, the Appellant would respectfully submit that he was deprived of the effective assistance of prior counsel because these were objections of arguable merit that ought to have been advanced on his behalf. Commonwealth v. Pierce, supra; Strickland v. Washington, supra.

In Commonwealth v. Karl Chambers, 599 A. 2d 630 (Pa., 1991), this Court vacated a death sentence where the prosecutor argued that the Bible says that the murderer shall be put to death, even though the Commonwealth contended that this was but a single isolated reference in a closing argument. This Court held that even a curative instruction would not have been sufficient to eliminate the prejudicial result of an improper reference to religious law in a closing speech at a death penalty hearing.

In the instant case, the prosecutor argued to the jury that the jury should be alert to the possibility that its "Christian values" might interfere with its determination as to the question of life or death, noting that he, the prosecutor, was "a Christian myself". The prosecutor went on to tell the jury that what we are concerned with in this case is that there is "law in the city and there's a law of God. There is a law of this land and there is a law that we must act through this land, a spiritual law and that being the law of God." (N.T. 11/16/83, 124). The prosecutor then told the jury that the law in this case "is not some Christian law", but rather the law of the land.

While these references in the prosecutor's closing speech may not have been as specific as the reference found so prejudicial in Commonwealth v. Chambers, supra, the Appellant respectfully submits that it is still improper for a prosecutor to make references to religious laws or values in the course of his closing speech in a death penalty hearing. In this case, the danger was that such references may have caused jurors to believe that the "law of God" or the "spiritual law" is somehow implicated in their deliberation process. Such considerations regarding religious values

had no place whatsoever in the manner in which the jury was to reach its decision as to the question of life or death.

When the prosecutor told the jury that he knows that their decision "is tough, I have been here before and I know and I hear and when I understand that people that find things difficult, feel good afterwards for applying the law" (N.T. 11/16/83, 145), the prosecutor once again improperly appealed to the jury on a non-record basis to return a sentence of death. The prosecutor told the jury that returning such a sentence would complete "their part . . . in the law enforcement process . . ." (N.T. 11/16/83, 145).

The jury has no part in the law enforcement process and should not be subject to recruitment by the prosecutor in a crusade for public sanctioning of this Defendant. The prosecutor's assurance that in his previous death penalty cases, the juries have felt good after imposing the death penalty is a disgraceful attempt to obtain a desired result based on extrajudicial considerations.

In Lesko v. Lehman, 925 F.2d 1527, Cert. den. 112 S. Ct. 273 (3rd Cir., 1991), the United States Court of Appeals reversed a death penalty from Pennsylvania where the prosecutor argued that the jury should try to "even the score" and sought the death penalty on the ground that the jury should treat the Defendant with the same cruel and malevolent approach the Defendant had exhibited in dealing with his victim. In this case, the prosecutor also appealed to the jury's emotions instead of sticking to the evidence.

Considering all of these remarks together, the Appellant respectfully submits that he was thereby deprived of a fair and just determination of the question of the imposition of the sentence of death. Therefore, this Court should remand for a new death penalty hearing.

D. THE LOWER COURT MAY HAVE MISLED THE JURY TO BELIEVE THAT MITIGATING CIRCUMSTANCES HAD TO BE AGREED UPON UNANIMOUSLY, IN VIOLATION OF MILLS V. MARYLAND AND COMMONWEALTH V. JASPER.

At the time of the death penalty hearing in this case on November 16, 1983, the trial Judge gave the following instructions to the jury (N.T. 11/16/83, 152-153):

> The Court: It will only take me a few minutes to give the final instructions which I already gave to you but I'm required to give to you as the last legal instruction before the jury retires to deliberate on the sentence.
>
> Before the jury retires to consider the sentencing verdict, the Court shall instruct the jury on the following matters:
>
> 1. The aggravating circumstances specified in subsection D as to which there is some evidence and I have already done that.
>
> The mitigating circumstances specified in subsection E, to which there is some evidence and you have -- each of you had a copy of those.

Now, aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt. Mitigating circumstances must be proved by the Defendant by a preponderance of the evidence A preponderance of the evidence is somewhat less than the burden of proof by reasonable doubt.

Now, the verdict must be a sentence for death if the jury unanimously finds at least one aggravating circumstance specified in subsection D, which you have seen and no mitigating circumstances or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

And the Court may in its discretion charge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence in which case the Court shall sentence the Defendant to life imprisonment.

The Court shall instruct the jury on any other matter that may be just and proper under the circumstances and I have no further instructions and I direct the jury to go to the jury room and consider the sentencing verdict.

Court Officer: Everyone remain seated while the jury leaves the room.

The jury retired to deliberate on the sentencing verdict at 1:55 p.m. and returned from the jury deliberation room with a question at 4:03 p.m.

The Court Crier: May I proceed, sir?

The Court: yes.

The Court Crier: Foreman, please rise. Please state your name for the record, sir.

Jury Foreman: Millage Harris.

The Court Crier: Sir, I understand you have a question for the Court. Would you please read the question to the Court.

Jury Foreman: Yes, Sir. Do we have to apply any checkmarks besides the aggravating and mitigating circumstances on the final sheet? What I'm saying, is that there's a poll taken and say we were using all 10 questions, you know, just for example, and there's quite a possibility that all 12 people would not pick all 10. Do you want a checkmark or do you want a number beside those?

The Court: I think I understand your question.

Jury Foreman: Okay.

The Court: I'll just read the instructions from the law and then I'll answer your question.

The verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance that's specified in subsection D which you have and no mitigating circumstances or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating

circumstances. The verdict must be a sentence of life imprisonment in all other cases.

In other words, the only ones that you would mark off and report would be that all of you had agreed upon. Are there any further questions?

Jury Foreman: You don't want a number there, you just want a checkmark.

The Court: A checkmark. Write so we --

Jury Foreman: All right. Fine. Fine. Fine. Fine. Fine.

The Court: And just check off whichever one it is and then on the final page you would have to check off questions as follows:

The aggravating circumstances outweigh the mitigating circumstances and you answer that yes or no. That would be checked off and then you would have to check off either death or life imprisonment.

Then all the members of the jury would have to sign the foreman's copy.

Jury Foreman: Okay.

The Court: No further questions?

Jury Foreman: Just a minute, Your Honor. I want to find out if everyone is satisfied.

Thank you.

> The Court: I direct the jury to return to the jury room and continue your deliberations. (Emphasis supplied).

The jury returned to the deliberation room to deliberate further at 4:06 p.m. At 5:50 p.m., the jury returned the verdict as to sentencing.

The jury found that as to Appellant Joseph Kindler, the aggravating circumstances outweighed the mitigating circumstances and the jury rendered a sentence of death.[7]

Immediately after the jury was polled, defense counsel placed on the record an objection based upon what he saw as the "complete confusion on the part of the jury as to whether the number of individuals who had voted for a specific mitigating v. aggravating circumstance." (N.T. 11/16/83, 161). Defense counsel told the Judge that the Court's response to the jury's question created ". . . a possibility wherein 8 people might vote for an aggravating circumstance, 6 might vote for a mitigating circumstance and because there wasn't a unanimous decision on whether or not there was a mitigating or an aggravating circumstance, that would be rejected." As defense counsel reviewed the sentencing sheet, it became clear to him that the jury did not even find that there existed the mitigating circumstance of the Appellant having no significant history of prior convictions, even though the record showed that he had none. Defense counsel expressed

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[7] As to codefendant Scott Shaw, the jury found that the aggravating circumstances did not outweigh the mitigating circumstances and rendered a sentence of life imprisonment.

his concern that the jury may have failed to return a finding of any mitigating circumstances because it wrongfully believed that it had to be unanimous to make such a finding. Defense counsel therefore requested that because of the possibility of juror confusion in this regard, the jury should be recharged. The Judge refused to do so, but noted that defense counsel had entered this objection on the record (N.T. 11/16/83, 164).

It is also important to note that the trial Judge made opening remarks to the jury at the beginning of the death penalty hearing. At that time, the Judge discussed the aggravating and mitigating circumstances as outlined in the Act, but failed to tell the jury that mitigating circumstances need not be unanimously agreed upon (N.T. 11/16/83, 30).

In the evidence at the death penalty hearing, the Appellant presented testimony from several witnesses who were familiar with the Appellant and who generally testified that he had developed excellent skills in the area of electronics (N.T. 11/16/83, 61, 66, 69, 76, 75). Furthermore, in defense counsel's closing speech to the jury, he argued that as to mitigating circumstances, the Appellant had no significant history of previous convictions and in fact there was no evidence that he had had any convictions (N.T. 11/16/83, 104). He also brought to the attention of the jury the testimony that showed that the Appellant was a wizard in the area of electronics and may have the opportunity, should he be sentenced to life imprisonment, to create and establish good and useful things in that field while in prison (N.T. 11/16/83, 105). In addition, defense counsel brought out that at the

time of the incident, his client was only 21 years of age (M.T. 11/16/83, 105).

In McKoy v. North Carolina, 494 U.S. 433 (1990), the United States Supreme Court followed its reasoning in Mills v. Maryland, 486 U.S. 367 (1988), and held that a sentencing scheme which creates a substantial probability that reasonable jurors think that they are precluded from considering any mitigating evidence unless all twelve jurors agreed on the existence of a particular mitigating circumstance is unconstitutional. In accord, see Williams v. Dixon, 51 CrL 1025 (4th Cir., March 13, 1992) (holding that this principle is a bedrock procedural rule that is retroactively applicable even to offenders whose death sentences were already final).

In Commonwealth v. Frey, 554 A.2d 27 (Pa. 1989), the Defendant argued that the jury instructions and verdict slip employed in the penalty phase of that case were deficient in light of Mills v. Maryland, supra. The Court rejected that challenge because the instructions in that case tracked the language of the statute and did not suggest a requirement that any mitigating circumstance must be unanimously recognized before it can be weighed against aggravating circumstances in reaching a verdict. Because individual jurors in that case were clearly free to weigh whatever mitigating circumstances they perceived, regardless of whether other jurors agreed that those circumstances were established by the evidence, that Defendant's rights were not abridged.

In Commonwealth v. Jasper, 587 A.2d 705 (Pa., 1991), the Defendant asserted that the trial Court's instructions with regard to unanimity and mitigating

circumstances also violated Mills v. Maryland, supra. The problem arose from the response to the jury's question regarding unanimity after deliberations had begun. The question was whether or not all of the jurors had to agree "whether a circumstance is true or not true?". 587 A.2d at 711. This Court reasoned that the judgment of sentence of death in that case must be vacated and employed the following analysis:

> While the question is not absolutely clear as to which circumstances (i.e., aggravating or mitigating) the jury's question was directed to, nothing on the record clarifies the confusion. Accordingly, it appears that the jury could have been misled into believing that a unanimous verdict was required in order to conclude a mitigating circumstance existed. Such a perception undoubtedly could have tainted the weighing process and the ultimate outcome.
>
> Recently, in Commonwealth v. Frey, 520 Pa. 338, 554 A.2d 27 (1989), we addressed the Mills issue. There, we had no problem in concluding that the jury instruction did not express a need for unanimity in determining the existence of a mitigating circumstance. However, the present appeal goes one step further. For in this instance, it is not the instruction which causes us concern, but the response to a question posed for clarification. Since we cannot interrogate each juror as to his/her belief and the record is unclear as to what the question is referring to, we have no alternative but to conclude that the Appellant may have been prejudiced by the Court's response. Accordingly, we must vacate the judgment of sentence and remand this matter to the Court of

Common Pleas of Philadelphia County for a new sentencing hearing.

Appellant respectfully submits that the instant case is controlled by the decisions of the United States Supreme Court in Mills v. Maryland, supra, and of this Court in Commonwealth v. Jasper, supra. In neither his opening instructions nor in his closing charge did the trial Judge specifically instruct the jury that a finding of the existence of a mitigating circumstance need not be unanimously agreed upon (N.T. 11/16/83, 30, 152). In the Penalty Determination Sheet, the jury checked off no mitigating circumstances and yet, in the same sheet, the jury said that the aggravating circumstances "outweigh the mitigating circumstances" (See Exhibit "A" attached hereto, page 3). Appellant notes that this record established that the Appellant had certainly satisfied the existence of at least one of the mitigating circumstances, to wit, that the Appellant had "no significant history of prior criminal convictions". The fact that the jury did not even check off that this factor had been established indicates that the jury may well have misunderstood the question of what is sufficient to report back that mitigating circumstances have been found. In this regard, Appellant also

* * *

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in order to conclude that a mitigating circumstance existed. In view of the undisputed fact that Appellant had at least one mitigating circumstance, the failure of the trial Judge to properly instruct the jury at this

point clearly warrants the vacating of the death sentence.

* * *

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outweighs" the probative value of any proof offered against it, or that the proof was the "greater weight of the evidence". In Sigafoos v. Pennsylvania Board of Probation and Parole, 503 A.2d 1076, 1079 (Pa. Cmwlth., 1986), the Commonwealth Court cited Commonwealth v. Del Conte, 419 A.2d 780 (Pa. Super. 1980) for the following definition of this term: "A preponderance of the evidence is such proof as leads the fact finder to find that the existence of a contested fact is more probable than its nonexistence."

As noted herein, the record is uncontested that the Appellant Joseph Kindler had no significant history of prior criminal convictions; nevertheless, the jury did not check off on the Penalty Determination Sheet that they had found the existence of this mitigating circumstance. The Appellant had also presented other evidence (regarding his age and his electronics skills) to indicate that Appellant had established the "catch-all" mitigating circumstance regarding "any other evidence of mitigation concerning the character and record of the Defendant . . .".

Accordingly, Appellant respectfully contends that the confusion of the jury with respect to unanimity as discussed in the preceding Argument along with the failure of the trial Judge to properly define the standard of proof required for a finding of mitigating

circumstances may have denied the Appellant a fair chance for a jury finding on that critical question. Thus, the matter warrants a judgment that this sentence of death should be vacated.

E. THE TRIAL JUDGE ERRED IN FAILING TO FIND AS A MATTER OF LAW THAT THE APPELLANT HAD ESTABLISHED THE MITIGATING CIRCUMSTANCE OF "NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL CONVICTIONS".

As indicated by the foregoing, the Appellant respectfully submits that his lawyer had shown at the sentencing hearing that he had had no significant history of prior criminal convictions, an undisputed fact which was not contested by the prosecution.[8] Nevertheless, in its findings, this jury did not check off on the Penalty Determination Sheet that the Appellant had established this factor.

Appellant respectfully submits that the trial Judge should have found as a matter of law that this mitigating circumstance had been shown and that it was a factor that the jury should therefore consider in determining whether or not aggravating circumstances in this case outweighed this mitigating circumstance or any other mitigating circumstances that the jury would have discretion to find.[9]

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[8] In his opening instructions at the death penalty hearing, the trial Judge told the jury that this mitigating circumstance was a matter which the "lawyers can present to you" (N.T. 11/16/83, 33).

[9] To the extent that prior counsel for the Appellant did not raise this issue at the time of the sentencing hearing, the Appellant

Had the Judge so informed the jury, the outcome of these proceedings may well have been different, because the jury would have been obligated to weigh that mitigating circumstance against whatever aggravating circumstances the jury may have found. Since the jury apparently found no mitigating circumstances, the finding of any aggravating circumstance required the returning of a verdict of a death sentence.

Appellant hereby incorporates by reference the preceding Arguments regarding the manner in which the trial Judge may have improperly instructed the jury regarding unanimity with respect to mitigating circumstances and the absence of a definition of the concept of a preponderance of the evidence in order to find the presence of mitigating circumstances. Taking all of these Arguments together, the Appellant respectfully submits that this is a death sentence that should be vacated in the interest of justice and fundamental fairness.

V. APPELLANT WOULD NOT OBJECT TO A REMAND TO THE COMMON PLEAS COURT FOR A FULL DETEWINATION OF ISSUES RAISED HEREIN INCLUDING TRIAL ERRORS AND SENTENCING ERRORS, WHERE THE TRIAL JUDGE ABUSED HIS DISCRETION IN

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respectfully submits that he would have thereby been deprived of the effective assistance of counsel to which he was constitutionally entitled. It is noted that this issue was raised on Appellant's behalf in supplemental Post-Verdict Motions filed by Ms. Wasser, although not in the context of a claim of ineffective assistance of trial counsel, as was required.

REFUSING TO REINSTATE POST-VERDICT AND POST-SENTENCE MOTIONS.

As indicated by the Opinion of the Honorable Eugene Clarke, Jr., Judge of the Common Pleas Court of Philadelphia, annexed hereto as Exhibit "J", the trial Judge refused to rule on the merits of Post-Verdict Motions and additionally refused to rule on the merits of Post-Sentencing Motions challenging the death penalty. When the Appellant was captured and brought back before Judge Geisz, the trial Court refused to permit reinstatement of those Motions.

Thus, the issues which were presented on Appellant's behalf in trial counsel's Post-Verdict Motions or in Post-Verdict Motions counsel's supplemental Post-Verdict Motions were never addressed in the Court of Common Pleas of Philadelphia. In addition, there are issues which are raised in this appeal which were never presented at all to the lower Court, generally as a result, it is alleged here, of ineffective assistance of prior counsel.

Accordingly, the Appellant respectfully submits that he would have no objection if this Court were to deem it appropriate and just to remand this matter to the Court of Common Pleas of Philadelphia County for further proceedings in order to allow the lower Court a full and complete opportunity to correct the errors of which the Appellant complains herein and, if necessary, to allow an evidentiary hearing regarding those claims of ineffectiveness of counsel which were not developed before the lower Court.

To the extent that this Court's decision in Commonwealth v. Judge, supra, indicates that issues

of trial error are forfeited for purposes of appellate review by reason of Appellant's escape, Appellant respectfully would take issue with that conclusion and wishes to preserve his position that the lower Court abused his discretion in refusing to permit reinstatement of Post-Trial Motions, supplemental Post-Trial Motions and Post-Sentence Motions and that it would be improper to prohibit an Appellant from attempting to show good cause for reinstatement of either Post-Trial Motions or an Appeal after he has been returned to the custody of this jurisdiction.

Furthermore, when the case is a capital one, the severity and finality of the sentence of death warrants full review of the trial errors and of sentencing errors of which the Appellant complains on Appeal.

Appellant notes that under Pennsylvania Rule of Appellate Procedure 1972(6), a Motion to Quash an Appeal may be granted where the Appellant "is a fugitive", which thereby suggests that the court should permit reinstatement and therefore consideration of an Appeal when the Appellant is no longer in a fugitive status, is of the case here."

As recognized in the State of Louisiana in State v. Falcone, 383 So. 2d 1243, 1247 (La., 1980), dismissal of the appeal of a death row escapee has the effect of making his escape a capital offense. See also Tuddle v. Virginia, 323 Se. 2d 539 (Va., 1984).

In Gregg v. Georgia, 428 U.S. 153, 187 (1976), the Supreme Court of the United States noted that the "unique nature of the death penalty" makes appellate review even more necessary in the context of the capital case than that of a routine felony. Although the

Court stated in Molinaro v. New Jersey, 396 U.S. 365 (1970) that the act of an escape disentitled the accused to call upon an Appellate Court to review his claims, the Court has not gone so far as the hold that that result would obtain in a capital case as well.

Unlike the Defendant in Commonwealth v. Judge, supra, this Appellant is not a fugitive, but rather is before the Court and has been in custody since his recapture. While Judge was a fugitive from justice who could not be made subject to the jurisdiction of this Court, Appellant respectfully notes that he is before the Court and is in Pennsylvania's custody; therefore, Appellant requests that this Court provide relief in the form of an Order remanding this case to the Court of Common Pleas of Philadelphia County for a further disposition of all of his claims, trial and sentencing.

VI. CONCLUSION

For all of the reasons above-expressed, the Appellant Joseph Kindler respectfully prays this Honorable Court grant the following relief:

1. Appellant requests that this Court award him a new trial.

2. In the alternative, Appellant respectfully requests that this Honorable Court vacate the judgment of the sentence of death.

3. In the alternative, the Appellant respectfully requests this Honorable Court vacate the sentence and remand this matter to the lower Court for further proceedings.

Respectfully submitted,

/s/ A. Charles Peruto, Sr.
A. CHARLES PERUTO, SR.

/s/ Burton A. Rose
BURTON A. ROSE
Attorneys for Appellant

* * *

[CERTIFICATE OF SERVICE OMITTED
IN PRINTING OF THIS APPENDIX]

* * *

[EXHIBITS OMITTED IN PRINTING
OF THIS APPENDIX]

IN THE SUPREME COURT OF PENNSYLVANIA

E.D. APPEAL DOCKET, 1991
No. 155 E.D. App. Dkt. 1991

[Filed February 22, 1994]

COMMONWEALTH OF PENNSYLVANIA	)
	)
vs.	)
	)
JOSEPH KINDLER, APPELLANT	)
	)

APPLICATION FOR REARGUMENT
SUR PA. R. APP. PRO. 2541 ET SEQ

A. CHARLES PERUTO, ESQUIRE
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STATEMENT OF THE REASONS RELIED UPON FOR ALLOWANCE OF REARGUMENT

Attached herewith as Exhibit "A" is a true and correct copy of the Opinion Announcing the Judgment of the Court issued by Mr. Justice Papadakos on February 9, 1994, sustaining the conviction of Murder of the First Degree and affirming the sentence of death as imposed upon the Appellant, Joseph Kindler, by the Court of Common Pleas of Philadelphia County, Criminal Trial Division, Nos. 2747, 2748 and 2750 of August Term, 1982.

The plurality opinion is accompanied by a concurring Opinion authored by Mr. Justice Cappy and joined in by Justice Flaherty and Zappala, along with a concurring Opinion authored by Justice Flaherty.

The Appellant, Joseph Kindler, was convicted on November 15, 1983 following a trial by jury before the Honorable John A. Geisz of the Court of Common Pleas of Philadelphia County on the charges of Murder of the First Degree, Kidnapping and Conspiracy. The same jury determined that the Appellant should be sentenced to death.

Appellant escaped from custody on September 19, 1984 and was returned to this jurisdiction on September 26, 1991. During that interval, his post-verdict motions had been dismissed by Judge Geisz by reason of the escape.

Appellant was formally sentenced to death on October 2, 1991 and he subsequently filed a pro se notice of appeal.

Present counsel has argued to this Court, in two briefs and in two oral arguments, that Appellant's claims of trial error and sentencing error should be heard on appeal notwithstanding the previous escape. In this regard, Appellant has cited the decision of the United States Supreme Court in Ortega-Rodriguez v. United States, 113 SCt. 1199 (1993), which held that claims of error on appeal should not be dismissed if there is no connection between a defendant's former fugitive status and the present appellate process.

Nevertheless, the opinion Announcing the Judgment of the Court has held that the trial Court's proper dismissal of post-verdict motions by reason of Appellant's escape during the post-verdict litigation process warrants the refusal of this Court to entertain his claims of error on direct appeal. The theory as stated by the Opinion announcing the Judgment of the Court is that to hear such claims would allow Appellant ". . . to benefit from his contemptuous disrespect for the trial Court" (Opinion, p. 7).

Appellant respectfully submits that if there is to be a principle of law that his appellate claims should be heard if the Appellant was not a fugitive at the time he invoked the appellate process, that rule would be swallowed in whole if his claims would not be heard on direct appeal merely because the lower Court refused to hear them while the Appellant was in fact a fugitive before the trial Court. While it is clear that there can be a reasonable connection between the post-verdict motion litigation process and the Appellant's escape during that time interval, this does not mean that the Court can carry that result into the appellate decision-making process as well and hold, as has been done here, that all of Appellant's claims of error are to

be dismissed without review because the trial Court dismissed Appellant's post-verdict motions.

To follow the logic of the opinion Announcing the Judgment of the Court its rational conclusion, the Court would be dismissing all capital appeals of any defendants who, in the position of this Appellant, had their post-verdict motions dismissed while they were fugitives during the time that their cases were before the lower Court, even though a defendant was not in a fugitive status at the time he invoked the appellate jurisdiction of the Pennsylvania Supreme Court. Such a result would fly in the face of the reasoning behind the Ortega-Rodriguez decision.

In fact, in Ortega-Rodriguez, the defendant there, like the Appellant here, had fled before sentencing and was recaptured before appeal. Discussing the same disentitlement theory that was discussed by the opinion Announcing the Judgment of the Court in the instant case, the United States Supreme Court concluded that said theory does not warrant an appellate Court to sanction dismissal of appellate claims of error based upon conduct that exhibited disrespect for any aspect of the judicial system where that conduct has no connection to the course of the appellate proceedings. As the Supreme Court of the United States stated, such a result would reach too many appeals, including those of defendants, whose former fugitive status in no way affects the appellate process, as is the case here.

Thus, in effect, the Opinion Announcing the Judgment of the Court treats this Appellant as if he were in fact a "fugitive during the appellate process" (Opinion, p. 7), when he, in reality, has been before the

Court and in custody prior to the time he filed a notice of appeal in this case.

Furthermore, under this Court's precedent in cases such as Commonwealth v. Zettlemoyer, 454 A.2d 937 (Pa., 1982) and Commonwealth v. Pirela, 507 A.2d 23 (Pa., 1986), the mere fact that the lower Court had decided not to rule on post-verdict motions and had treated those claims of error as having been waived does not prevent the Supreme Court of Pennsylvania from entertaining the merits of those issues while the matter is before the Court on direct appeal. Because this is a capital case, this Court has always permitted a relaxed doctrine of waiver with respect to the failure to advance claims in post-verdict motions; nevertheless, the Court did not consider, in its Opinion Announcing the Judgment of the Court, that the failure of these matters to be decided in the lower Court would not have to be a bar to their resolution in this direct appeal.

Finally, with respect to the Appellant's claims regarding sentencing error, the Appellant has repeatedly argued that the lower Court misled the jury to believe that mitigating circumstances had to be agreed upon unanimously in violation of the decision of this Court in Commonwealth v. Jasper, 587 A. 2d 705 (Pa., 1995) and the decision of the United States Supreme Court in Mills v. Maryland, 486 U.S. 367 (1988). As discussed in Argument IV-D (Appellant's Brief, pages 41-49), the record reflects that the trial Judge responded to a question from the jury as to whether they had to apply any check marks (on the verdict slip) "besides the aggravating and mitigating circumstances" by stating that, "The only ones that you would mark off and report would be that all of you

had agreed upon" (N.T. 11/16/83, 155). In Jasper, this Court refused to let a death penalty stand based upon almost identical circumstances because the record presented nothing to clarify the confusion of the jury as to which circumstances must be found unanimously.

Appellant has also argued that the trial Judge erred at the sentencing hearing in failing to define the term "preponderance of the evidence" with respect to a finding of mitigating circumstances. The Judge only told the jury that the defendant had the burden of proving mitigating circumstances by a preponderance of the evidence which is ". . . somewhat less than the burden of proof by reasonable doubt" (N.T. 11/16/83, 152). Yet, in Commonwealth v. Craig Williams, 615 A.2d 716, 726 (Pa., 1992) and Commonwealth v. Lee Baker, 614 A.2d 663, 677 (Pa., 1992), this Court made it clear that it is appropriate to instruct the jury that a preponderance of the evidence "in essence is proof that something is more likely than not", or where the evidence of one side "is more believable than the other side". See also Se-Ling Hosiery, Inc. v. Margulies, 364 Pa. 45, 49 (1950).

The Appellant also argued with respect to sentencing errors that the prosecutor committed misconduct in his closing speech to the jury seeking the death penalty, particularly by telling the jury that, based upon the prosecutor's personal experience, if they return a verdict of death, they will "feel good afterwards . . ." (N.T. 11/16/83, 144-145). In that same speech, the prosecutor made extensive and improper references to "the law of God" (N.T. 11/16/83, 123-124).

Thus, Appellant has presented substantial reasons to indicate that the sentence that was imposed by the

lower Court was the result of arbitrary factors within the meaning of 42 C.P.S.A. §9711(h)(3).[1]

Therefore, Appellant respectfully submits that his constitutional right to full and complete review of his death sentence pursuant to Gregg v. Georgia, 428 U.S. 153, 187 (1976) has been abridged by the failure of this Honorable Court to resolve and rule upon the issues that he has raised, not only with respect to claims of trial error, but also and most especially with respect to claims of sentencing error as have been presented in the instant appeal. Appellant further contends that even if this Court were to enforce its own escape/waiver doctrine under Commonwealth v. Judge, 609 A.2d 785 (Pa., 1992), the Court would still be obligated to rule upon the merits of the claims of sentencing error which have been advanced in the instant appeal on behalf of Joseph Kindler.

CONCLUSION

Pursuant to the provisions of Rule 2543 of the Pennsylvania Rules of Appellate Procedure, the Appellant, Joseph Kindler, respectfully prays this Honorable Court reconsider its ruling of February 9, 1994 for the reasons expressed herein. It is clear that the result of this case is inconsistent with decisions of the United States Supreme Court as well as prior

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[1] In Mills v. Maryland, supra at 374, the Supreme Court of the United States noted that a death sentence resulting from an improper instruction regarding unanimity being required for mitigating circumstances would represent "the height of arbitrariness". In accord, see Espinosa v. Florida, 51 CrL 3096 (U.S., 1992) (vague jury instructions in capital cases lead to an arbitrary result, citing cases).

decisions of the Supreme Court of Pennsylvania and therefore, the interests of justice require that the relief requested in this appeal should be granted.

Respectfully submitted,

/s/
A. CHARLES PERUTO, ESQUIRE

/s/
BURTON A. ROSE, ESQUIRE
Attorneys for Appellant

* * *

[CERTIFICATE OF SERVICE OMITTED IN PRINTING OF THIS APPENDIX]

* * *

[EXHIBIT OMITTED IN PRINTING OF THIS APPENDIX]

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COURT OF COMMON PLEAS OF THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

AUGUST TERM 1982
No. 2747-2752
POST CONVICTION RELIEF ACT

[Dated January 11, 1996]

COMMONWEALTH OF PENNSYLVANIA	)
	)
v.	)
	)
JOSEPH J. KINDLER, Petitioner	)
Prison No. BQ-3190	)
Graterford, Pennsylvania	)
	)

PETITION FOR RELIEF UNDER
POST CONVICTION RELIEF ACT

TO THE HONORABLE, the Judges of the Court of Common Pleas of the First Judicial District of Pennsylvania:

COMES NOW, Joseph J. Kindler, the Defendant in the above-captioned criminal matter and the Petitioner herein, by his attorneys, A. Charles Peruto, Esquire and Burton A. Rose, Esquire, and does hereby

respectfully move this Honorable Court to enter an Order granting relief under the Pennsylvania Post Conviction Relief Act, 42 P.C.S.A. §9541 et seq, and in support thereof hereby represents the following:

1. Petitioner is Joseph J. Kindler, an individual who has been convicted of crimes under the laws of the Commonwealth and is currently serving a sentence of imprisonment and is waiting execution of a sentence of death for these crimes.

2. Petitioner avers that the conviction or sentence in question resulted from the following:

(a) Violations of the Constitution of Pennsylvania, the laws of this Commonwealth, and/or the Constitution of the United States, which, in the circumstances of this case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place, or that no reliable adjudication of the penalty of death could have taken place;

(b) Ineffectiveness of counsel which, in the circumstances of this case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place, or that no reliable adjudication of the penalty of death could have taken place.

(c) Violations of the provisions of the Constitution or laws of the United States which would require the granting of Federal habeas relief to a state prisoner; and

(d) The imposition of a sentence (death) which is greater than the lawful maximum (life imprisonment).

3. The allegations of error set forth herein have either not been waived or, if any allegation of error is deemed waived, such alleged errors have resulted in the conviction or affirmance of sentence of an individual who is innocent with respect to his having been adjudicated by a jury to be sentenced to death, Furthermore, if any allegation of error is deemed waived, such waiver would not constitute a state procedural default barring Federal habeas corpus relief.

4. The failure to litigate any claim of error advanced herein, prior to or during trial or on post-verdict motions or on direct appeal, was not the result of any rational strategic or tactical decision by counsel.

5. This matter arises from the killing of one David Bernstein on July 24, 1982 in Philadelphia for which your Petitioner, along with a co-defendant, Scott Shaw, was charged. On November 15, 1983, a jury, having heard the case before the Honorable John Geisz, presiding, found the Petitioner guilty of Murder of the First Degree, Kidnapping and Criminal Conspiracy. On November 16, 1983, the jury returned a verdict of Death.

6. At time of trial, the Petitioner was represented by Daniel-Paul Alva, Esquire. Mr. Alva was granted leave to withdraw on March 16, 1984 and, on July 16, 1984, Nancy D. Wasser, Esquire entered her

appearance and filed supplemental post-verdict motions.

7. On October 23, 1984, Judge Geisz ordered that all post-verdict motions filed on behalf of Petitioner would be dismissed because the Petitioner had become a fugitive as of September 20, 1984.

8. On October 3, 1991, the Petitioner having been apprehended and returned from Canada, a hearing was held before Judge Geisz who refused to permit reinstatement of the previously dismissed post-verdict motions even though your Petitioner was no longer a fugitive. At that point, Judge Geisz formally sentenced the Petitioner on Bill No. 2750 to Death by Lethal Injection; on Bill No. 2747, Petitioner was sentenced on the Kidnapping Charge to a term of not less than 10 nor more than 20 years imprisonment, to run consecutively to the sentence imposed on Bill No. 2750; on Bill No. 2748, the Petitioner was sentenced to a term of not less than 5 nor more than 10 years imprisonment on the charge of Criminal Conspiracy, to run concurrently with the sentence imposed on Bill No. 2750.

9. On October 22, 1991, your Petitioner filed a Notice of Appeal pro se to the Supreme Court of Pennsylvania as per No. 155 Eastern District Appeal Docket 1991. Present counsel entered their appearance on behalf of this Petitioner on October 30, 1991 with the Supreme Court.

10. On February 9, 1994, the Supreme Court of Pennsylvania affirmed the judgments of sentence in this matter. On February 23, 1994, an Application for Reargument was filed with the Supreme Court of

Pennsylvania but the same was denied on April 8, 1994.

11. On July 15, 1994, a Petition for a Writ of Certiorari was filed on Petitioner's behalf with the United States Supreme Court but the same was denied in October of 1994. The Petitioner remains incarcerated on death row at the State Correctional Institution at Graterford, Pennsylvania. No further proceedings have been filed on his behalf since the decision denying the Writ of Certiorari by the United States Supreme Court.

12. All of Petitioner's contentions on direct appeal were dismissed without a ruling on the merits for the reason that Petitioner had become a fugitive during the pendency of post-trial motions before the lower court and, since the lower court dismissed those motions and refused to reinstate the same upon Petitioner's apprehension and return to custody, the Supreme Court concluded that all of Petitioner's contentions were waived by reason of not having been properly preserved in post-verdict motions before the lower court. Thus the Supreme Court of Pennsylvania only reviewed what it considered to be the mandatory and automatic elements of capital review pursuant to 42 P.C.S.A. §9711(h). The Court did not review Petitioner's several claims of arbitrary sentencing error, however.

13. Petitioner submits that the resolution of his claims of error without an adjudication on the merits has abridged his Federal and State Constitutional rights to due process of law as would require the granting of Federal habeas corpus relief to a state prisoner and which has resulted in the affirmance of

the imposition of the sentence of death which is greater than the lawful maximum, to wit, a sentence of life imprisonment.

(a) The Pennsylvania Supreme Court has a doctrine relaxing the rule of waiver in capital review cases; nevertheless, the Supreme Court refused to apply the relaxed waiver doctrine in your Petitioner's case, despite his request that the Court do so.

(b) The Supreme Court of Pennsylvania has permitted appellate review of claims by former fugitives where there is no direct connection between the former fugitive status and the present appeal; however, the Supreme Court refused to permit review of your Petitioner's contentions in this matter, even though the Petitioner was not a fugitive at the time of the filing of the instant notice of appeal and there was no direct connection between your Petitioner's former fugitive status and the direct appeal to the Supreme Court of Pennsylvania.

(c) The Supreme Court of Pennsylvania has not regularly and uniformly applied either the relaxed waiver doctrine in capital cases and/or the fugitive disentitlement doctrine in appellate matters but rather has applied these principles in an arbitrary manner such that Petitioner's claims should not have been dismissed without resolution upon their merits for either of these reasons.

(d) Petitioner further contends that the fugitive disentitlement doctrine, which has resulted in the refusal of the state appellate court to resolve his claims on direct appeal, should not be applied in this, a collateral proceeding, where Petitioner is presently

in custody and there is no direct connection between his former fugitive status and the present proceedings under the Post-Conviction Relief Act.

(e) Therefore, Petitioner's claims, as set forth in the Statement of the Questions Presented in the Brief for Appellant before the Supreme Court of Pennsylvania, should be considered now on their merits, and the same are incorporated herein as though fully set forth in this pleading (See attached Statement of the Questions Presented from Petitioner's Brief for Appellant filed in the Supreme Court of Pennsylvania).

14. Petitioner avers that he was deprived of the effectiveness of counsel to which he was entitled under the Federal and State Constitutions for the failure of trial counsel to fully present any and all mitigating evidence that could have and ought to have been presented on his behalf at the time of the death penalty hearing in this matter, which in the circumstances of this case, so undermined the truth determining process that no reliable adjudication of the penalty of death could have taken place, and which ineffectiveness constituted a violation of the Constitution and laws of the United States and would require the granting of Federal habeas corpus relief to a state prisoner.

(a) To the extent that successor counsel in this litigation failed to raise this or any other claim of ineffectiveness of counsel which is advanced by the present Petition during those phases of this matter when successor counsel represented the Petitioner, your Petitioner finds that he must therefore claim that he was additionally thereby deprived of the

effectiveness of counsel to which he was constitutionally entitled during the post-verdict motions proceedings. These claims could not have been raised on direct appeal because the grounds upon which the claims are based do not appear of record.

(b) Should this Court allow an evidentiary hearing in support of this application, which is hereby requested by this Petitioner, the Petitioner is prepared to present the testimony of his father, Joseph Kindler, his mother, Magda Kindler Kolteit and his sister Magda Salemno, as well as his own testimony, to establish that the Petitioner was raised in a family deeply troubled by domestic violence and abuse, and that they were prepared to so testify if called upon by counsel. Although all three members of your Petitioner's family were present in Court at the time of the death penalty hearing, trial counsel did not interview these people concerning their knowledge of the Petitioner's troubled and abused childhood and did not attempt to present their testimony, although the same was fully available to him, at those proceedings, thereby denying the Petitioner the opportunity to present evidence which has been found in other cases to have constituted mitigating grounds upon which a jury could have returned a verdict of life imprisonment rather than a penalty of death.

(c) Furthermore, trial counsel neglected to inquire as to the availability of an expert witness who could have testified on Petitioner's behalf at the death penalty phase hearing that, on the basis of the testimony from the Petitioner and his family regarding the violent and troubled childhood of Petitioner, the Petitioner's conduct in the instant case may have resulted from the Petitioner's having witnessed as a

child the almost constant domestic violence in his household and having experienced physical abuse during his formative years. At the time of any evidentiary hearing that the Court may allow in support of this application, which hearing is hereby requested by Petitioner, the Petitioner will present testimony from a witness who is qualified to provide the sort of information that the jury, at the death penalty hearing in this case, should have been presented, to wit, that psychological and social trauma of a child caused by witnessing and sustaining domestic violence and abuse has serious behavioral and emotional consequences which have a profound effect on that child's future ability to conform his or her behavior to societal norms.

(d) There was no reasonable basis for counsel's failure to investigate and present this evidence of a mitigating character. Petitioner was surely prejudiced since the jury found no mitigating circumstances. Had this evidence been presented, the outcome of the proceeding – death instead of life – may well have been different.

15. Petitioner avers that he was further deprived of the effectiveness of counsel, as has been pleaded heretofore, in that trial counsel failed, at the time of the death penalty hearing, to request that the death penalty hearing in his matter be severed from that of his co-defendant, Scott Shaw, particularly where the Commonwealth argued to the jury that the Petitioner deserved the death penalty because of his role in corrupting, dominating and controlling his youthful co-defendant, Scott Shaw, and thereby leading Shaw into complicity in this homicide. During the death penalty proceeding, the prosecutor cross-examined

Scott Shaw's mitigation witness, Doris Coulter, by bringing out that Shaw was subject to being influenced by "older people" with respect to his behavior (NT 11/16/83, 57-58). The prosecutor did not present any evidence regarding aggravating circumstances against Mr. Shaw and, in the course of his closing argument at the death penalty hearing, the prosecutor told the jury that the Petitioner's role in influencing Shaw's behavior could be seen on Shaw's behalf as a mitigating circumstance (NT 11/16/83, 141-143), while as to the Petitioner, the relationship between him and Shaw was implicitly suggested as being an aggravating circumstance, even though such a matter is not among the enumerated statutory grounds for the finding of an aggravating circumstance. Petitioner respectfully submits that these circumstances establish an arbitrary and unwarranted basis upon which the jury in this case may have reached a conclusion that the Petitioner's sentence should be death. Had trial counsel for the Petitioner sought to invoke the discretion of the trial court in obtaining a severance of the death penalty proceeding from that of the co-defendant, the relationship between Shaw and the Petitioner would not have been developed in this regard. Furthermore, trial counsel was ineffective, to the extent that the joinder would be required, by not advancing an objection to the prosecutor's argument, contained in the cross-examination of Shaw's witnesses and in his closing speech to the jury, advancing the Shaw-Kindler relationship as a suggested aggravating circumstance, or by demanding an appropriate cautionary instruction limiting the impact of such references.

(a) To the extent that successor counsel in this litigation failed to raise this claim of

ineffectiveness of counsel during those phases of this case when successor counsel represented the Petitioner, it is respectfully submitted that Petitioner was thereby also deprived of effective assistance of counsel during the post-verdict motions proceedings. As before, these claims could not have been raised on direct appeal because the grounds upon which the claims are based do not appear of record, especially with respect to trial counsel's possible strategic reasons upon which the remedies of either severance, objections, or cautionary instructions were not pursued.

(b) Should this court allow the evidentiary hearing hereby requested, the Petitioner is prepared to present the testimony of former counsel to establish that there would have been no reasonable basis for counsel's failure to advance these arguments on his behalf.

(c) Petitioner was prejudiced by these omissions since the jury may well have been persuaded by the prosecutor's suggestion that Petitioner's relationship with Scott Shaw warranted a finding of the penalty of death. The prosecutor's argument that Petitioner deserved death while co-defendant Shaw did not created an impermissible leveraging, to wit, that the jury would sentence Petitioner to death but grant life to Shaw. Had such an argument been precluded, the outcome of the proceeding – death instead of life – may well have been different.

16. Petitioner respectfully submits that as a matter of fundamental fairness, he is entitled to have the merits of all of the contentions discussed herein, including those previously presented in his direct

appeal, heard and considered on their merits by the courts of Pennsylvania. To deny Petitioner this relief would constitute a fundamental miscarriage of justice and an abridgement of his state and federal constitutional rights to due process of law.

WHEREFORE, the Petitioner, Joseph J. Kindler, respectfully moves this Honorable Court, in the interest of justice, to grant relief under the Post Conviction Relief Act.

Respectfully submitted,

/s/ Burton A. Rose
A. CHARLES PERUTO, ESQUIRE
BURTON A. ROSE, ESQUIRE
Attorneys for Petitioner
Joseph J. Kindler

* * *

[CERTIFICATE OF SERVICE OMITTED
IN PRINTING OF THIS APPENDIX]

VERIFICATION

Joseph J. Kindler, Defendant in the above-captioned matter and Petitioner herein, hereby verifies that the facts set forth in the attached Petition are true and correct to the best of his personal knowledge, or information and belief and that any false statements herein are made subject to the penalties of Section 4904 of the Crimes Code relating to unsworn falsification to authorities.

/s/ Joseph J. Kindler
Joseph J. Kindler

* * *

[ATTACHMENT OMITTED IN
PRINTING OF THIS APPENDIX]

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
TRIAL DIVISION - CRIMINAL SECTION

AUGUST TERM, 1982
NO. 2747-2752
(PCRA)

[Filed April 10, 1996]

COMMONWEALTH OF PENNSYLVANIA	)
	)
v.	)
	)
JOSEPH KINDLER	)
	)

COMMONWEALTH'S MOTION TO DISMISS

TO THE HONORABLE, THE JUDGE OF SAID COURT:

LYNNE ABRAHAM, District Attorney of Philadelphia County, by her assistant, CAROL MEEHAN SWEENEY, respectfully represents:

I. STATEMENT OF FACTS

The trial evidence, as accurately summarized by the Pennsylvania Supreme Court, was overwhelming, and firmly established defendant's guilt.

> [O]n April 2, 1982, the Sound Odyssey store in Lower Moreland Township, Bucks County, was burglarized. A Lower Moreland Township patrol officer noticed a vehicle with its lights out

pulling out of the cul-de-sac behind the Sound Odyssey at a high rate of speed and further noticed three persons inside the vehicle. Police were able to stop this vehicle, but the driver fled and was not apprehended. The two remaining passengers of this vehicle, Scott Shaw (Shaw), a sixteen-year old juvenile and the victim, David Bernstein (Bernstein) were detained and arrested. While in police custody, Bernstein identified [defendant] as the driver of the vehicle and furthermore told the police that the burglary was [defendant's] idea and that he would be willing to testify against [defendant] and Shaw. This information was then conveyed to the Philadelphia Police, since [defendant] lived in Philadelphia, and the police secured a warrant for [defendant's] arrest.

The police executed the warrant by going to [defendant's] home and, after a struggle, handed [defendant] a copy of the warrant which clearly named Bernstein as the informant. [Defendant] was arrested and charged with the burglary of Sound Odyssey, along with other theft-related offenses at other locations in three counties. Following a preliminary hearing, [defendant] was held for court in Montgomery County for the Sound Odyssey theft and [defendant] filed a motion to quash the charges against him, claiming that the evidence presented at the preliminary hearing was insufficient. A hearing was scheduled on this motion for July 23, 1982, and the Montgomery County District Attorney's Office obtained an order granting Bernstein immunity so that he could testify at this hearing. Bernstein's

attorney informed [defendant's] attorney that his client had been immunized for the July 23, 1982, hearing and that, if called to the stand, he would testify.

At the July 23, 1982, hearing Bernstein appeared pursuant to the immunity order but [defendant] did not appear, nor did his counsel and the motion to quash was dismissed with prejudice. Trial was set for August 17, 1982, and Bernstein, fearing that [defendant] might try to prevent him from testifying, planned to move back home with his parents on July 25, 1983, according to testimony provided by the victim's mother.

[Defendant] complained to Shaw and Shaw's girlfriend, Michelle Raifer (Raifer), that he had to get rid of Bernstein because he would testify against him and discussed several plans with them for eliminating Bernstein, including drowning him in the Delaware River. On July 24, 1982, [defendant] met with Raifer, who arranged to get her mother's car and to meet [defendant] and Shaw. That evening the three met and drove the car to within a block of Bernstein's apartment. Raifer called Bernstein and established that he was home and [defendant] instructed Raifer to leave and return to the apartment later in the evening with the car. At this time, [defendant] placed an inner tube and flippers into the trunk of the automobile.

[Defendant] and Shaw then hid in a field near Bernstein's apartment to watch the door.

Raifer returned between 2:30 and 2:45 a.m. on July 25, 1982, and [defendant], holding a black baseball bat, met her outside the apartment. [Defendant] told Raifer to ring the doorbell and to get Bernstein to come outside while [defendant], armed with his baseball bat, hid in the alleyway right next to the door to the apartment building.

Raifer did as she was instructed. Bernstein opened the door and had a conversation with Raifer and after some time [defendant] pulled the door fully open, dragging out Bernstein and began beating him over the head with the baseball bat approximately 20 times. Shaw also appeared on the scene and [defendant] instructed him to hit Bernstein with an electric prod, which he did five times in the ribs. At this point Bernstein was rendered immobile and [defendant] and Shaw dragged their victim to Raifer's waiting automobile, leaving a thirty-foot long trail of blood stains, and threw him into the trunk. [Defendant], Raifer and Shaw got into the car and drove with Bernstein still moaning in the trunk, for seven miles to a point on the River Road on the Delaware River. [Defendant] and Shaw then took Bernstein out of the trunk and as they began to throw Bernstein's body into the river, [defendant] told Raifer to drive back to the main road and wait for them. Raifer drove off, but returned soon to find [defendant] and Shaw emerging from the river. All three re-entered the automobile and [defendant] explained that Bernstein's body wouldn't sink so they had to fill his lungs with

water and tie a cinder block around his neck to weigh the body down.

On the way back to Philadelphia, Raifer was instructed to stop the car so that [defendant] could throw away the baseball bat, clothes and shoes he and Shaw had used during the murder. These items were tossed into various sewer inlets along Grant Street. The police later recovered the blood-stained baseball bat, shirt, pants and shoes that [defendant] wore, and Shaw's t-shirt and shoes.

When the three returned to [defendant's] home, they tried to wash the blood stains out of the trunk, using a styrofoam ice chest to carry out the water. They then broke up the ice chest and threw it and the trunk mat of Raifer's automobile into another sewer inlet. The pieces of broken ice chest and the trunk mat, the swimming suits that [defendant] and Shaw were wearing, the inner tube, electric prod and a camouflage shirt that [defendant] had worn were all later recovered from this sewer inlet by the police.

There was also testimony provided by one of Bernstein's neighbors (Craig Satinsky) that he heard Bernstein being beaten and a car driving away and that when he came outside to investigate he saw Bernstein's apartment door open with Bernstein's girlfriend sitting there. By this time the girl was hysterical and corroborated Satinsky's suspicion that it was Bernstein that he heard being beaten and dragged off in an automobile. They both went

> out to the street and saw the trail of blood and Bernstein's girlfriend, Lisa Rothbarth, called the police giving them information which led them to look for Raifer's car. Within a few hours, the police intercepted Raifer at her home and seized the blood-soaked car. Raifer eventually confessed, identified Shaw and [defendant] as Bernstein's murderers, and led the police to the various sewer inlets, where as already indicated, they retrieved the various items used in connection with the murder.
>
> On July 26, 1982, at around 7:30 p.m., Bernstein's body surfaced in the Delaware River near River Road. The body had a cinder block tied to its neck. Multiple blows to the head were observed which were later shown by a medical examination to be consistent with blows from a bat and bruises were seen to the chest consistent with being made by the electric prod. The forensic medical examination also revealed that, prior to expiring, Bernstein ingested water and silt. The cause of death was identified as drowning and massive head injuries.

Commonwealth v. Kindler, 536 Pa. 228, 236-239, 639 A.2d 1 (1994) (Footnote omitted), cert. denied, Kindler v. Pennsylvania, 115 S.Ct. 327, 130 L.Ed.2d 287 (1994).

II. STATEMENT OF THE CASE

Defendant was arrested on August 1, 1982 and charged, inter alia, with murder, kidnapping, and criminal conspiracy, 18 Pa.C.S, §§ 2502(a), 2901, and

903, as a result of his participation in the assassination of twenty-two year old David Bernstein.

On November 15, 1983, a jury sitting before the Honorable John A. Geisz convicted defendant of murder in the first degree (Bill No. 2750), kidnapping (Bill No. 2747), and criminal conspiracy (Bill No. 2748). At the subsequent penalty hearing on November 16, 1983, the Commonwealth introduced the trial record, and presented argument. Defendant presented witnesses who testified to his aptitude in electronics and his resulting possible future contributions to society if the death penalty was not imposed. After deliberating, the jury sentenced defendant to death.[1] Daniel-Paul Alva, Esquire, represented defendant at trial and at the sentencing hearing.

On November 28, 1983, Mr. Alva filed post-verdict motions on defendant's behalf. Thereafter, he was permitted to withdraw and Nancy D. Wasser, Esquire, was appointed to represent defendant. Ms. Wasser filed supplemental post-verdict motions on July 16, 1984.

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[1] The jury determined that two aggravating circumstances existed, i.e., that the victim was a prosecution witness to a felony committed by defendant and that the victim was killed for the purpose of preventing his testimony against defendant in a criminal proceeding (42 Pa. C. S. § 9711 (d) (5)), and that defendant committed the killing while in the perpetration of a felony (kidnapping) (42 Pa. C. S. § 9711 (d) (6)). The jury did not specifically find that any mitigating circumstances were present. See Commonwealth v. Kindler, supra, 536 Pa. at 230-231.

On September 19, 1984, before Judge Geisz could act on defendant's post trial motions, defendant escaped from the maximum security block of the Philadelphia Detention Center in an orchestrated jail break that involved an attack on a guard.[2] He became a fugitive from justice, evaded a nationwide police alert, and fled to Canada – whose policy at that time was to refuse to extradite to the United States criminals under sentence of death.

On October 10, 1984, the Commonwealth filed a petition to dismiss defendant's post-verdict motions due to defendant's status as a fugitive. On October 23, 1984, after an evidentiary hearing, the trial court found that defendant's voluntary escape forfeited his post-verdict rights, and dismissed his post-verdict motions. The trial court continued formal sentencing until further notice.

Defendant's flight from the legal authorities of two countries was summarized by the Pennsylvania Supreme Court in its opinion denying defendant appellate relief.

> [Defendant] remained at large until April 26, 1985, when he was arrested near St. Adele in the Province of Quebec, Canada, on criminal and immigration charges. On July 3, 1985, the United States requested [defendant's]

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[2] Defendant's escape was engineered by having one inmate create a diversion by flooding his cell, having a second inmate attack a guard, and having a third inmate take defendant's place in his cell, while defendant and the first inmate fled through a sawed-out barred window and climbed over the razor-wire fence (N.T. 10/23/84, 12-24, 43-44, 62-63, 78).

> extradition which was granted on January 17, 1986, by the Minister of Justice. [Defendant] sought to review that decision in the Canadian Courts and, once again, during the review process, [defendant] escaped from the Parthenais Prison in Montreal on October 23, 1986, and remained a fugitive for almost two years, until after information on [defendant] was broadcast on a television program "America's Most Wanted." [Defendant] was spotted and arrested in St. John, Province of New Brunswick and returned to custody in September 1988. The Supreme Court of Canada ultimately affirmed the decision of the Minister of Justice on September 26, 1991, and defendant was returned to Philadelphia that day.

536 Pa. at 231 (Citation omitted) (Emphasis added).[3]

His seven-year flight from Pennsylvania finally terminated, defendant was brought back before the trial court on October 3, Defendant demanded reinstatement of his post-verdict motions. The trial court denied his request, reaffirming that by his escape from Pennsylvania and flight from this country, defendant had forfeited his right to post-verdict motions. The court then formally imposed the sentence of death required by the jury's verdict eight years before (N.T. 10/3/91, 2-3, 8).

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[3] Defendant effected his escape from Canada's Parthenais Prison on October 23, 1986 by breaking through a prison skylight and lowering himself thirteen stories to the ground. Another inmate fell to his death in the attempt.

Pursuant to 42 Pa.C.S. § 9711(h)(1), defendant's case was automatically appealed to the Pennsylvania Supreme Court in October 1991. A. Charles Peruto, Esquire and Burton A. Rose, Esquire, represented defendant. Defendant attempted to raise various claims of error, and contended that the trial court abused its discretion in refusing to reinstate his post-verdict motions after law enforcement authorities succeeded in apprehending him and returning him to Pennsylvania.

On February 9, 1994, after extensive briefing and argument, the Supreme Court of Pennsylvania ruled that the trial court had properly dismissed defendant's post-verdict motions when he fled, and properly refused to reinstate them upon his return to Pennsylvania seven years later. As a result, the Supreme Court held, defendant's appeal came to it without any allegations of error, direct or collateral, preserved. Commonwealth v. Kindler, supra, 536 Pa. at 234. The Supreme Court accordingly refused to reach the merits of defendant's allegations of error. Commonwealth v. Kindler, Id.[4]

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[4] All six participating justices agreed that the trial court possessed full authority to dismiss defendant's post-verdict motions and to refuse to reinstate them under the facts here. Three justices concurred separately to indicate that post-verdict motions might be reinstated if, after returning to custody, a defendant showed a compelling reason for having his claims heard. Id. at 232-234, 242, 243 (Opinion Announcing the Judgment of the Court; concurring opinions of Cappy & Flaherty, JJ.). None of the justices thought that defendant had presented any such reason for hearing his claims despite his flight.

The Pennsylvania Supreme Court then proceeded to perform the review that it requires for all capital appeals, even those without preserved claims of error. Under Commonwealth v. Zettlemoyer, 500 Pa. 16, 154 A.2d 937 (1982), cert. denied, 461 U.S. 970, rehearing denied, 463 U.S. 126 (1983), the Supreme Court reviewed the record to determine if sufficient evidence supported the jury's verdict of murder of the first degree. The court concluded that the evidence was more than sufficient to prove defendant's guilt beyond a reasonable doubt. The Supreme Court then considered the validity of defendant's death sentence as required by 42 Pa.C.S. § 9711(h). The Supreme Court found that the evidence admitted in the penalty phase fully supported the aggravating circumstances found by the jury: killing a prosecution witness, and killing in the course of a felony, namely, kidnapping. The Supreme Court also studied the record and found that the sentence of death was not excessive, or disproportionate to the penalty imposed in similar cases. Finally, the Supreme Court found, upon reviewing the record, that the sentence of death was the product of the evidence, and not a product of passion, prejudice or other arbitrary factor. Commonwealth v. Kindler, supra, 536 Pa. at 239-241. The Court concluded that "the jury correctly returned death as its sentence." Id. at 241. The Pennsylvania Supreme Court denied defendant's request for reargument on April 8, 1994.

On July 15, 1994, still represented by Mr. Peruto and Mr. Rose, defendant petitioned for a writ of certiorari to the Supreme Court of the United States. The lone question raised by defendant there focused upon the adequacy of the trial court's instructions during the penalty phase. The United States Supreme

Court denied defendant's request for certiorari on October 11, 1994. Kindler v. Pennsylvania, 115 S.Ct. 327, 130 L.Ed.2d 287 (1994).

On January 11, 1996, defendant filed a Petition for Relief Under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541 et seq. (hereinafter "Petition"). In it, Mr. Peruto and Mr. Rose, on behalf of defendant, attempt to reassert the claims raised before and rejected by the Supreme Court of Pennsylvania on direct appeal, challenge the legality of that court's rejection of defendant's claims, and set forth various allegations of ineffective assistance of counsel.[5] The Commonwealth hereby responds to defendant's Petition.

III. MOTION TO DISMISS

Rather than awaiting sentencing and taking a direct appeal, defendant chose to flee from the Commonwealth. When apprehended in Canada, defendant again chose to flee from legal authorities rather than allow the courts there to complete their review of the decision to extradite defendant to Pennsylvania.

Now that his seven-year flight from Pennsylvania finally has terminated and he has been returned to the Commonwealth, defendant seeks collateral relief from the consequences of his actions. He contends that he is

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[5] In his PCRA Petition, defendant "incorporated herein as though fully set forth in this pleading" those claims asserted in the Statement of Questions Presented in his brief before the Supreme Court of Pennsylvania. Petition at ¶ 13(e). Defendant also claimed that both trial and appellate counsel had been ineffective.

entitled to pursue his appellate claims and others through the device of a petition under the PCRA. He is wrong.

As noted above, the Supreme Court of Pennsylvania has specifically found that defendant's decision to escape and flee rather than allow the judicial process to take its course justified dismissal of the post-verdict motions pending at the time of his flight and effectively terminated defendant's ability to seek collateral review. Commonwealth v. Kindler, supra, 536 Pa. at 234. As the Supreme Court explained:

> [Defendant's] conduct demonstrated absolute disrespect for the legal process and for the authority of the court and . . . the action taken in dismissing [his] post-verdict motions was a reasonable response to [defendant's] "flouting" of the authority of the court. . . .
>
> [W] e cannot permit [defendant] to resurrect his post-verdict motions, various allegations of ineffective assistance of trial counsel, prosecutorial misconduct and trial court error at this time, thereby, allowing him to benefit from this contemptuous disrespect for the trial court . . .
>
> Thus, this appeal comes to us without any allegations of error (direct or collateral) preserved, much like those cases where an Appellant either choses (sic) not to raise any issues related to the trial and sentencing hearing or as in those cases where the

> Appellant is a fugitive during the appellate process.

Id. at 233-234 (Footnote omitted) (Emphasis added). Defendant's Petition, therefore, must be dismissed.[6]

Ironically, defendant, who did everything within his power to remain beyond the reach of Pennsylvania's courts for seven years, now demands that they permit him to flee scot-free. After baldly contending that his allegations of error are not waived,[7] defendant criticizes the decision of the Supreme Court of Pennsylvania in his case,[8] and claims that "as a matter of fundamental fairness he is entitled to have the merits of all of [his contentions], including those previously presented in his direct appeal, heard and considered on their merits by the courts of Pennsylvania." Petition at ¶ 16. This claim is not only incorrect, it also completely misconstrues Pennsylvania precedent concerning the waiver and fugitive disentitlement doctrines.

Defendant contends that the Supreme Court of Pennsylvania erroneously and "arbitrarily" applied the

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[6] Because, as the Pennsylvania Supreme Court has found, all claims of error were forfeited by defendant's escape and flight, the Commonwealth will not address the alleged merits of these claims. If, as defendant now demands, he is entitled to disregard the decision of the highest court in our state, the Commonwealth respectfully requests the opportunity to substantively refute the claims in defendant's brief.

[7] Petition at ¶ 3.

[8] Petition at ¶ 13.

fugitive disentitlement doctrine and principles of waiver to deny him the opportunity to bring a direct appeal. Even a cursory reading of the Supreme Court's decision in this case, however, makes clear that it focused solely upon whether the trial court acted appropriately when it dismissed defendant's post-verdict motions due to his escape. The Supreme Court looked at the nexus between defendant's fugitive status and the court process at the trial court level, and declared that the trial court could "move on to the cases of others whose whereabouts are known" and "defend its own dignity" by dismissing defendant's post-verdict motions once he escaped. Commonwealth v. Kindler, supra, 536 Pa. at 233-234. Defendant's forced return to and presence in Pennsylvania at the time of his appeal to the Supreme Court was irrelevant to the decision of the trial court almost ten years earlier.[9]

Defendant also contends that his mere presence in Pennsylvania entitles him to bring the instant action under the PCRA. Here, too, however, defendant is wrong.

That a defendant who forfeits his right to appeal by escaping may not, once apprehended, resurrect it through a collateral attack upon his conviction was also made clear by the Pennsylvania Superior Court in Commonwealth v. Craddock, 370 Pa.Super. 139, 535 A.2d 1189 (1988), affirmed, 522 Pa. 491, 564 A.2d 151

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[9] The standards of review set forth in Kindler, and the wisdom of the trial court's decision there, were adopted by the Pennsylvania Supreme Court in In the Interest of J.J., 656 A.2d 1355,1362-1363 (Pa. 1995).

(1989) (per curiam). Defendant there was charged with aggravated assault and related offenses. He left the courtroom during jury deliberations and failed to return. Defendant was found guilty, in absentia, of all charges and a warrant was issued for his arrest. Three months later, the post-verdict motions of defendant, who remained a fugitive, were denied and he was sentenced in absentia.[10] No direct appeal was taken.

When finally returned to Pennsylvania, defendant challenged the effectiveness of his trial counsel and the court's decision to sentence him in absentia by filing a petition under the Post Conviction Hearing Act ("PCHA").[11] By his voluntary fugitive status, however, defendant was deemed to have waived his rights under the PCHA, and his petition was dismissed without an evidentiary hearing. The Superior Court affirmed.

As the Craddock court explained, the PCHA compelled one seeking collateral relief to prove that his

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[10] Law enforcement authorities and the court were unaware that defendant had been imprisoned in California in the interim as the result of his arrest for an unrelated crime. 535 A.2d at 1191.

[11] The PCHA governed all collateral attacks filed before April 13, 1988, and was superseded by the Post Conviction Relief Act, 42 Pa.C.S. §9541 et seq.

claim has not been waived.[12] The court then discussed the concept of "waiver" in light of defendant's intentional flight and failure to take a direct appeal

> The general rule is that in a criminal case, voluntary fugitive status disentitles a defendant to call upon the resources of the court for the disposition of a defendant's legal claims. Escape of a convicted defendant may properly be considered rejection of the means afforded defendant for challenging his conviction and imprisonment. Thus, by choosing fugitive status, defendant forfeits his right to have his claim considered. The fact that [a] defendant is subsequently recaptured provides no basis for disturbing the order dismissing his appeal, as [a] defendant who elects to escape from custody waives his right to appellate review.

535 A.2d at 1191 (Citations omitted).

The Craddock court concluded that the waiver provisions of the PCHA prevent defendant from obtaining indirectly that which he could not obtain directly. Specifically, the court declared defendant's

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[12] Under the PCHA, an issue was waived if one knowingly and understandingly failed to raise the issue, and it could have been raised on appeal, unless this failure resulted from some specific "extraordinary circumstance". 42 Pa.C.S. § 9544 (b).

The PCRA also contains a waiver requirement. 42 Pa.C.S. § 9543(a)(3). Under its more stringent standard, however, failure to timely raise an issue bars its consideration unless defendant shows that he is innocent or that the waiver does not constitute a state procedural default under federal habeas corpus law. 42 Pa.C.S. § 9543 (a)(3)(ii) & (iii).

knowing and voluntary waiver of his right to a direct appeal due to his escape operated as a waiver of his right to assert claims under the PCHA as well.

> [I]n spite of the fact that petitioner is within the control of the court at the time of this [collateral] appeal, his voluntary fugitive status at the time for direct appeal acts as a knowing and understanding waiver of his appellate rights.

Id. Accordingly, the court affirmed the dismissal of defendant's PCHA petition. As explained above, the Pennsylvania Supreme Court has recognized that the same result is warranted here.

Simply put, defendant should not be permitted to argue that his forced return to Pennsylvania enables him to avoid the consequences of his escape from prison and his knowing and intentional failure to pursue his post-verdict rights by obtaining collateral relief under the PCRA. See, Commonwealth v. Passaro, 504 Pa. 611, 616, 476 A.2d 346 (1984) ("It would be unseemly to permit a defendant who rejected the appellate process in favor of escape to resume his appeal merely because his escape proved unsuccessful"). Indeed, to hold to the contrary would "allow [defendant] to benefit from his contemptuous disrespect for the trial court", 536 Pa. at 234, and run directly counter to the determination of the Pennsylvania Supreme Court that defendant had waived all claims for purposes of collateral review.

If there were ever a defendant who forfeited his right and privilege to seek collateral review pursuant to the PCRA, it was this defendant. He should not now

be allowed to break out of two prisons, flee the country for seven years, and then demand that this Court ignore his blatant attack upon the Pennsylvania judicial system.

III. ANSWER

Defendant's factual allegations and claims for relief are specifically denied.

WHEREFORE, the Commonwealth respectfully requests that this Court dismiss defendant's petition under the Post Conviction Relief Act.

Respectfully submitted,

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BY: _____
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AUGUST TERM, 1982
NO. 2747-52
POST CONVICTION RELIEF ACT

[Filed August 7, 1996]

COMMONWEALTH OF PENNSYLVANIA)
)
v.)
)
JOSEPH KINDLER, PETITIONER)
)

TO THE HONORABLE JAMES LINEBERGER, JUDGE OF THE SAID COURT:

PETITIONER'S RESPONSE TO COMMONWEALTH'S MOTION TO DISMISS

Petitioner has filed an application under the Pennsylvania Post Conviction Relief Act seeking a new trial and/or a new death penalty hearing. The Commonwealth has filed a Motion to dismiss alleging that Petitioner is not entitled to the review of his claims on their merits because of the fugitive disentitlement doctrine. Petitioner respectfully urges this Honorable Court to deny the Commonwealth's motion.

Initially, Appellant observes that the escape occurred in September of 1984, subsequent to Appellant's trial (which culminated on November 15, 1983) and prior to Appellant's filing of a direct appeal (in October of 1991). The present petition for Relief Under the Post Conviction Relief Act was filed in January of 1996, some five years after his apprehension and return to this jurisdiction.

In that Petition, the Petitioner alleges that he was deprived of the effective assistance of prior counsel in failing to present evidence at the death penalty hearing which would have supported a finding of mitigating circumstances, to wit, that the Petitioner had been raised in a troubled and domestically chaotic household where he was subject to verbal and physical abuse. In addition, Petitioner alleged that counsel was ineffective in failing to seek a severance of his death penalty hearing from that of his co-defendant. Finally, Petitioner contended that he was -- and still is -- entitled to an adjudication on the merits of all of the claims that have been raised on his behalf in his previous direct appeal, which were disregarded by the Supreme Court of Pennsylvania because of the trial judge's dismissal of Petitioner's post-verdict motions. Petitioner's contentions regarding the death penalty, as raised on direct appeal, were also not considered by the Supreme Court of Pennsylvania even though they were not subject to the ruling by the trial judge regarding post verdict motions.

Under these circumstances, Petitioner respectfully submits that the record is clear that there is no meaningful connection between Petitioner's 1984 escape and his present application for relief under the Pennsylvania Post Conviction Relief Act. Accordingly,

under the present case law, this Court does have the discretion to refuse to grant the Commonwealth's motion.

In **Commonwealth v. Peter Huff**, 658 A.2d 1340 (Pa. 1995), the issue presented was whether that appellant waived his appellate rights regarding review of the denial of post conviction relief because he had become a fugitive from justice. In an opinion authored by now Chief Justice Flaherty, the Supreme Court held that it was not proper for the Superior Court to have dismissed Huff's appeal where the trial court chose to ignore the appellant's flight and disposed of the issues on their merits since the flight had occurred prior to sentencing and therefore had no significant effect on the appellate process. Thus, the Supreme Court concluded that in holding that the appellant had waived his appellate rights, **including the right to seek collateral relief**, the Superior Court had erred.[1]

In **In the Interest of J.J.**, 668 A.2d 1176 (Pa. Super., 1995), the Superior Court was faced with a remand from a decision in that same case by the Supreme Court of Pennsylvania, 656 A.2d 1355 (Pa. 1995), where the Superior Court's earlier decision in that case was vacated and remanded for the purpose

---

[1] It is noteworthy that in his dissenting opinion in **Commonwealth v. Huff**, Justice Castille cited the case upon which the Commonwealth relies in the present matter, **Commonwealth v. Craddock**, 564 A.2d 151 (Pa. 1989), which upheld a waiver of appellate rights. In view of the fact that Justice Castille's dissenting opinion was not joined in by any of the other justices, it is reasonable to conclude that the view expressed by the majority in **Huff** would control this issue and not the per curiam affirmance of **Craddock**.

of determining whether discretion should be exercised in appellant's favor to hear his appeal despite a prior escape. In that case, the appellant had been adjudicated delinquent and had filed a timely appeal; subsequently, the appellant escaped and was apprehended approximately one month later. The Superior Court had granted the Commonwealth's motion to quash the appeal due to the appellant's former fugitive status and it was this ruling which had been overturned by the Supreme Court.

On remand, the Superior Court determined that it would exercise its discretion by permitting the appeal to be heard, largely because there was no connection between the appellant's former fugitive status and the Superior Court's ability to dispose of the appeal.[2] See also **Commonwealth v. Deemer**, 671 A. 2d 688 (Pa. 1996) (granting review of per curiam affirmance of Superior Court, 667 A. 2d 418, and oral argument on issue of waiver due to fugitive status) and **Commonwealth v. Carino**, 659 A.2d 556 (Pa. 1995) (reversing Superior Court's order quashing appeal, based on **Huff**, supra).

---

[2] It should be noted that in the Supreme Court's decision in **In the Interest of J.J.**, supra, the Supreme Court expressly overruled its earlier decision in **Commonwealth v. Jones**, 610 A.2d 439 (Pa. 1992), which had stripped the appellate courts of their discretionary authority to entertain the appeal of a fugitive who had been returned to custody. The Supreme Court expressly overruled **Jones** to the extent that it removed the authority from the appellate courts to exercise discretion over appeals when a defendant had been a fugitive at any time during the appellate process so as to ensure that an appellate court would be able to exercise the same discretion as does a trial court in deciding what would be an appropriate response to a defendant's former fugitive status. The same standards would apply to a PCRA Court.

In **Degen v. United States**, 59 CrL 2125 (June 10, 1996), a unanimous United States Supreme Court rejected the argument of the Government that pursuant to the fugitive disentitlement doctrine, a federal court could dismiss the claim of a defendant who had refused to come to the United States to answer drug and forfeiture charges. While the Supreme Court confirmed that a federal court can dismiss an appeal of a defendant if he is a fugitive while his appeal is pending, once the fugitive has been recaptured dismissal will not be justified as long as the defendant is in fact before the court to answer to its judgment, his earlier fugitive status will not threaten the dignity of the court and the prosecution has not shown "actual prejudice" from the former escape. The Government position would, according to the Court, be harsh, arbitrary, excessive and "too rough", where "no necessity" exists for foreclosing the merits of the defendant's claim based upon his prior fugitive status.

The **Degen** decision was based upon the decision of the United States Supreme Court in **Ortega-Rodriguez v. United States**, 507 U.S. 234 (1993), where the Court sustained the authority of an appellate court to dismiss an appeal in a criminal matter when the party seeking relief becomes a fugitive but also held that the justifications advanced for dismissal of an appeal of a fugitive will generally not apply absent some connection between the fugitive status of the defendant and the present appeal. See also **Woods v. Kemna**, 13 F.3d 1244 (8th Cir. 1994), reviewing **Ortega-Rodriguez**, and concluding that, although that decision was not based upon the Constitution but rather upon the supervisory power of the Court, the High Court's Opinion indicates that there may be an outer boundary within which any

escape rule must function in order to be congruent with substantive due process, and that boundary would appear to be a rational connection between a defendant's fugitive status and the appellate process.

In the instant case, the Commonwealth has pointed to no actual prejudice which would result to its case from the petitioner's former fugitive status. Here, the petitioner is asking this Court to consider claims of the deprivation of the constitutional right, of effective assistance as provided by prior counsel in failing to present mitigating evidence or seek other relief during the death penalty phase of Petitioner's trial. Petitioner is presently in custody and there is no connection between his former fugitive status and the ability of this Court to hear his claims. Therefore, as a matter of Petitioner's federal and state constitutional rights to substantive and procedural due process of law, the Petitioner's claim should not be dismissed without a hearing.

Furthermore, Appellant notes that the Pennsylvania appellate courts have inconsistently, irregularly and arbitrarily applied the fugitive disentitlement doctrine in past cases. Under 42 P.C.S.A. § 9543(a)(3), there is no waiver of petitioner's claims if the waiver would not constitute a state procedural default under federal habeas corpus law. Federal habeas law provides that a state rule which is discretionary, rather than mandatory, is not "an adequate and independent basis" to support a procedural default. **Sullivan v. Little Hunting Park**, 396 U.S. 229, 233 (1969); **Harris v. Reed**, 489 U.S. 255 (1989). In **Johnson v. Mississippi**, 486 U.S. 578 (1988) and **Ford v. Georgia**, 498 U.S. 411 (1991), the United States Supreme Court held that in order to be

"adequate" to support a procedural default, a state rule must also be "firmly established and regularly followed by the time as of which it is to be applied". Petitioner respectfully submits that Pennsylvania's fugitive disentitlement doctrine does not meet these standards.

As the United States Court of Appeals for the Third Circuit in **Clark v. Pennsylvania**, 892 F.2d 1142, 1149 (3d Cir. 1989), "the Pennsylvania rule does not speak in unmistakable terms and . . . the Pennsylvania cases construing the law are not consistent." As noted heretofore, the Supreme Court of Pennsylvania in **In the Matter of J.J.** expressly overruled its prior controlling opinion in **Commonwealth v. Jones**, supra, and recognized the tortuous history of the permutations of the Pennsylvania rule: 656 A.2d at 1356-1362. In **Hathorn v. Lovorn**, 457 U.S. 255, 262 (1982), the Court held that state courts may not avoid deciding federal issues by invoking procedural rules that are not applied evenhandedly in cases. See also **Henry v. Mississippi**, 379 U.S. 443, 447 (1965).

In **Cochren v. Herring**, 43 F.3d 1404 (11th Cir. 1995), the Court held that a state procedural rule will not be an adequate bar to a federal habeas action where that rule has not been regularly followed or has been "sporadically invoked" or has otherwise not been firmly established. The state bar must have been "consistently applied" or it cannot constitute an adequate and independent ground to bar federal habeas review. See also **Bond v. Fulcomer**, 864 F.2d 306 (3d Cir. 1989) (state bar must speak in "unmistakable terms" and must be "strictly followed").

In addition, the Appellant notes that his direct appeal claims were not considered by the Supreme

Court of Pennsylvania even though this was a direct appeal in a death penalty case and that the Supreme Court has routinely permitted review of such claims despite the defendant's failure to have properly preserved those issues in post-verdict motions before the lower court. **Commonwealth v. Zettlemoyer**, 454 A.2d 937, 942 (Pa. 1982); **Commonwealth v. Billa**, 555 A.2d 835, 842 (Pa. 1989); **Commonwealth v. DeHart**, 650 A.2d 38, 48 (Pa. 1994). This "relaxed waiver" doctrine has been applied in both direct appeal and with respect to proceedings under the Post Conviction Relief Act. See **Commonwealth v. DeHart**, supra, **Commonwealth v. Banks**, 656 A.2d 467, 470 (Pa. 1995)("The Commonwealth contends that all of the issues in appellant's post conviction petition are waived . . . While we agree that some of the issues presented . . . could be deemed waived under the PCRA, we will nevertheless address all of appellant's claims since . . . it is this Court's practice to address all issues arising in a death penalty case irrespective of a finding of waiver."); **Commonwealth v. Yarris**, 549 A.2d 513 (Pa. 1988) (Court reached appellant's claim of trial error even though appellant had once escaped **from custody and issue had never been raised before the lower court, based on the "exception to the waiver doctrine"); Commonwealth v. Travaglia**, 661 A.2d 352, 356 (Pa. 1995).

In **Commonwealth v. Leslie Beasley**, No. 29 Capital Appeal Docket (Pa., 6/18/96), the Supreme Court found that that appellant's second PCRA petition had not met the standards set forth in **Commonwealth v. Lawson**, 549 A.2d 107 (Pa. 1988) for a second or subsequent such petition. Nevertheless, since that was a capital case, the Supreme Court agreed to address **Beasley's** claims.

So too in the instant case, this Court should not hesitate to entertain all of the claims advanced in Appellant's petition under the Pennsylvania Post Conviction Relief Act since this is a capital case and therefore there should be a relaxed waiver doctrine approach as has been routinely followed by the Supreme Court of Pennsylvania. The failure of the Supreme Court of Pennsylvania to abide by that doctrine in this particular case is further evidence of that Court's inconsistent, irregular and arbitrary application of its waiver doctrines so that there should be no state procedural default which would bar federal habeas review as discussed in § 9543(a)(3).

In **Goeke v. Branch**, 115 S.Ct. 1275 (1995), the United States Supreme Court reiterated the principle that its prior decision in **Ortega-Rodriguez,** supra, was not constitutionally based since there is no federal constitutional right to an appeal. However, the Supreme Court implied that federal due process may be implicated if a state constitutional right to an appeal exists: "If the supreme court of a state has acted in consonance with the constitutional laws of a state and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process."

In Pennsylvania, our Constitution specifically guarantees the right to an appeal: Article V, § 9; see **Commonwealth v. McFarlin**, 587 A.2d 732 (Pa. Super. 1991); **Commonwealth v. Wilkerson**, 416 A.2d 477, 479 (Pa. 1980). Therefore, "due legal process" in Pennsylvania requires that there be evidence of a nexus between the former flight and the case before the court before review of a former fugitive's petition

can be refused based upon that escape since without that nexus, refusal to grant review is unconstitutional and also "inadequate" to support procedural default.

This Petitioner had a state constitutional right to appellate review which the Supreme Court of Pennsylvania did not provide based upon its improper application of the fugitive disentitlement doctrine in this Petitioner's case. Therefore, by the present petition, the Petitioner is asking this Honorable Court to permit review of those issues. The failure to consider his claims would constitute a fundamental miscarriage of justice, **Coleman v. Thompson**, 501 U.S. 722, 750 (1991), **Murray v. Carrier**, 477 U.S. 478 (1986), for to permit this Petitioner to face execution without ever having a review on the merits of his claims of trial and sentencing error would surely constitute a "fundamental miscarriage of justice" such as would offend the sense of fairness of any court of justice. Such a remedy for the prior escape would be arbitrary, excessive and far "too rough", as the **Degen** Court indicates.

Therefore, Appellant Joseph Kindler respectfully prays this Honorable Court deny the Commonwealth's Motion to Dismiss and instead schedule this matter for the evidentiary hearing requested by Appellant so that he may undertake his burden of proving the merits of his claims for relief under the Post Conviction Relief Act.

Respectfully submitted,

/s/ _____

A. CHARLES PERUTO, ESQUIRE

/s/
BURTON A. ROSE, ESQUIRE
Attorneys for Appellant

* * *

[CERTIFICATE OF SERVICE OMITTED
IN PRINTING OF THIS APPENDIX]

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT
OF PENNSYLVANIA

CRIMINAL TRIAL DIVISION

AUGUST TERM, 1982
NO. 2747-2752
PCRA

[Filed July 23, 1997]

COMMONWEALTH)
)
V.)
)
JOSEPH KINDLER)
)

OPINION

LINEBERGER, J. July 23, 1997

PROCEDURAL HISTORY

Defendant Joseph Kindler was charged in 1982 with inter alia Murder, Kidnapping and Criminal Conspiracy. These charges stemmed from the killing of one David Bernstein.

Defendant was tried in November of 1983 before the Honorable John A. Geisz and a jury. On November 15, 1983, the jury found the defendant guilty of Murder of the First Degree, Kidnapping, and Criminal Conspiracy. A penalty hearing was then held and the jury fixed the penalty at death.

Subsequent thereto, the defendant filed post-verdict motions. However, before a hearing could be held on said motions, the defendant escaped from the Philadelphia Detention Center and fled to Canada.

As a consequence, the Commonwealth filed a petition to dismiss the defendant's post-verdict motions due to his fugitive status. An evidentiary hearing was held before Judge Geisz on October 23, 1984, who, at the conclusion of the hearing, ruled that the defendant, by escaping, waived review of his post-verdict motions and they were dismissed.

The defendant was eventually captured by Canadian authorities. The Supreme Court, in an Opinion denying the defendant appellate relief described the defendant's activities in Canada as follows:

> Appellant remained at large until April 26, 1985, when he was arrested near St. Adele in the Province of Quebec, Canada, on criminal and immigration charges. On July 3, 1985, the United States requested Appellant's extradition which was granted on January 17, 1986, by the Minister of Justice. Appellant sought to review that decision in the Canadian Courts and, once again, during the review process, Appellant escaped from the Parthenais Prison in Montreal on October 23, 1986, and remained a fugitive for almost two years, until after information on Appellant was broadcast on a television program "America's Most Wanted." Appellant was spotted and arrested in St. John, Province of New Brunswick and returned to custody in September, 1988. The Supreme Court of Canada

> ultimately affirmed the decision of the Minister of Justice (Kindler v. Canada (Minister of Justice) [1991] 2 S.C.R. 779, 8 C.R. (4th) 1, 11-12, 22, 25, 30, 33-35) on September 26, 1991, and Appellant was returned to Philadelphia that day.

Commonwealth v. Kindler, 536 Pa. 228, ___, 639 A.2d 1, 2 (1994).

The defendant was eventually returned to Philadelphia in the Fall of 1991 and he immediately petitioned to reinstate his post-sentence motions. Said petition was denied by Judge Geisz on October 3, 1991, who then immediately imposed the sentence of death fixed by the jury. (N.T. 10/3/91, pp. 2-3, 8).

Under the provisions of 42 Pa.C.S.A. §9711(h)(1) the matter was automatically appealed to the Pennsylvania Supreme Court. The defendant, represented by present counsel, challenged not only the refusal of the lower Court to reinstate his post-verdict motions, but also several other issues. The Supreme Court found that the defendant was entitled to no relief and affirmed his judgment of sentence. Commonwealth v. Kindler, 536 Pa. 228, 639 A.2d 1 (1994).

Defendant immediately filed a writ of certiorari with the United States Supreme Court. The petition was denied. Kindler v Pennsylvania, __ U.S. __, 115 S.Ct. 327, 130 Ed.2d 287 (1994).

On July 11, 1996, the defendant, still represented by the same attorney who represented him before the Supreme Courts of Pennsylvania and the United

States, filed a petition for relief under the Post-Conviction Relief Act. 42 Pa. C.S.A.§ 9541 et seq. Said petition raised several issues including those already raised on direct appeal to the Supreme Court as well as several claims which raised the ineffectiveness of trial and post-verdict counsel.

Due to the unavailability of the trial judge, this court was assigned to review the defendant's petition. On August 15, 1996 this court dismissed the defendant's petition without holding a hearing. The defendant thereafter timely filed a Notice of Appeal as well as a requested 1925(b) statement.

DISCUSSION

In his 1925(b) statement the defendant asserts that this court erred in dismissing his PCRA petition without granting him a hearing. He claims that his prior status as a fugitive should have played no role in this court's determination to dismiss his petition without a hearing because it, according to the defendant, has no significant effect on the instant proceedings and this court's ability to address his claims. This court disagrees.

The application of the relevant sections of the Post-Conviction Relief Act in effect at the time the defendant filed his petition demonstrate that no error

was committed in denying the defendant relief.[1] 42 Pa.C.S.A. § 9544 provided:

> "(a)Previous litigation.–For the purpose of this subchapter, an issue has been previously litigated if:
>
> "(1) it has been raised in the trial court, the trial court has ruled on the merits of the issue and the petitioner did not appeal;
>
> "(2) the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue; or
>
> "(3) it has been raised and decided in a proceeding collaterally attacking the conviction or sentence.
>
> "(b) Issues waived.–For the purposes of this subchapter, an issue is waived if the petitioner failed to raise it and if it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or other proceeding actually conducted or in a prior proceeding actually initiated under this subchapter.

Instantly, a review of the record indicates that the Supreme Court has already ruled that the defendant's decision to become a fugitive resulted in the waiver of all issues. The Court wrote:

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[1] The Post-Conviction Relief Act, 42 Pa C.S.A. § 9541 et. seq. under which the defendant filed his petition was amended in 1995 by the state legislature and made effective for all petitions filed after January 16, 1996.

> "Thus, this appeal comes to us without any allegations of error (direct or collateral) preserved, much like those cases where an appellant either choses [sic] not to raise any issues related to the trial and sentencing hearing or as in those cases where the appellant is a fugitive during the appellate process."

Kindler, 639 A. 2d at 4 (Footnote omitted) (Emphasis added).

Clearly, insofar as the Supreme Court has already addressed the identical issue raised herein, the defendant is not entitled to relief under the PCRA.[2]

Assuming arguendo that the Supreme Court had not deemed that the defendant waived all issues by becoming a fugitive, it is clear by doing so, he waived his right to collateral relief. In Commonwealth v. Bond, ___ Pa Super. ___, 693 A.2d 220 (1997) the Superior Court set forth a seven part test to be used in determining whether a defendant should suffer a penalty for choosing to become a fugitive. The Court said the following factors are relevant:

> (1) the stage of the proceedings when the flight occurred, i.e., during the trial, post-trial or on appeal; (2) the manner in which the defendant escaped; (3) whether the defendant escaped;

---

[2] The Court notes that in addition to the issues he raised in his direct appeal to the Supreme Court, he raised several other issues in the PCRA petition. See Defendant's PCRA Petition, pp 6-12. These additional issues are not cognizable in any event as the defendant could have raised them previously and chose not to do so. 42 Pa C.S.A. § 9544(b).

> (3) whether the defendant has been returned to custody; (4) the circumstances surrounding the defendant's return to custody, i.e., was the return voluntary or was the defendant captured in the course of committing another crime; (5) the length of time that the defendant remained at large; (6) the age/maturity/ condition of the defendant, i.e., whether he is a juvenile or adult and whether he is capable of comprehending fully the significance of his conduct; (7) the reasons for the defendant's flight . . . and, the effect which the defendant 's flight had upon the court's ability to engage in effective and meaningful review of the defendant's claims.
>
> Bond, 693 A.2d at 223.

Instantly, a review of the record indicates that the defendant escaped during the post-verdict stage of the proceedings before his post-verdict motions could be addressed to the trial court. The defendant escaped from the maximum security wing of the Philadelphia Detention Center with the assistance of other inmates and in the course of doing so a guard was attacked (N.T. 10/23/84, pp 12-24, 43-44, 62-63, 78). The defendant made his way to Canada where on April 26, 1985, near St. Adele in the province of Quebec, Canada he was arrested on criminal and immigration charges. United States Authorities immediately petitioned for the defendant's return but during the review process the defendant escaped from Parthenais Prison on October 23, 1986. He remained free for almost two years when he was again taken into custody by Canadian authorities. On September 26, 1991 the defendant was finally returned to Philadelphia. It is

noted that during the escape from the Canadian prison a fellow inmate was killed when he fell from the line that the defendant and that individual used to effectuate their jail-break.

From the foregoing, one may, without any doubt, conclude that the defendant had no intention of ever returning to Philadelphia to allow his case to work its way through the justice system in the usual way. In fact, the defendant's actions in Canada manifested his complete contempt for all legal process as well as a conscious intent not to avail himself of whatever legal redress and review he was entitled to there.

Despite this, the defendant now having been placed in a situation from which he is unlikely to escape, asks that his past actions be forgotten and that he be permitted to again avail himself of the myriad legal protections he so readily discarded. This court believes that the defendant's behavior was so outrageous, so egregious and so disruptive to the court system that he has waived his right of review. Allowing the defendant to proceed on his PCRA petition would nullify both Judge Geisz's and the Supreme Court's finding that the defendant waived his right to review. It would also be unfair to the Commonwealth and to prior counsel who defendant now asserts were ineffective given that almost a decade and one half have passed by since the defendant was convicted. To require the Commonwealth to prepare to litigate this matter and prior counsel to recall events that occurred so long ago where the defendant alone was responsible for the delay in litigating any claims he might have had simply would be unjust and inequitable in view of the defendant's efforts to thwart the timely administration

of justice. What our Supreme Court said in its opinion denying the defendant relief is apropos here:

> Here Appellant submitted post-verdict motions for the trial court to consider but rather than allowing the judicial process to take its course Appellant chose to escape and flee. Appellant's voluntary absence at this stage of the proceedings invites a response of dismissal firstly, to allow the court to move on to the cases of others whose whereabouts are known and who are in a position to appeal from the court's order disposing of their case and, secondly, as a means of allowing the trial court to defend its own dignity, by sanctioning an act of defiance that occurred solely within its domain.
>
> The connection to the trial court process is real because Appellant's conduct demonstrated absolute disrespect for the legal process and for the authority of the court and we conclude that the action taken in dismissing the post-verdict motions was a reasonable response to Appellant's "flouting" of the authority of the court and is, therefore, affirmed.
>
> Accordingly, we cannot permit Appellant to resurrect his post-verdict motions, various allegations of ineffective assistance of trial counsel, prosecutorial misconduct and trial court error at this time, thereby, allowing him to benefit from his contemptuous disrespect for the trial court. Furthermore, it would be anomalous to permit Appellant to prevail on this claim and then to subject the trial court to a remand order requiring it to rule on the

> merits of post-verdict motions and other collateral claims which were raised, or which could have been raised, at an earlier time and which could have been addressed and Appellant demonstrated some respect for the trial court and legal process.

Kindler, 639 A.2d at 3-4.

Accordingly, based on the forgoing this Court's dismissal of defendant's PCRA Petition should be affirmed.

By the Court

/s/ James A. Lineberger
Judge James A. Lineberger

IN THE SUPREME COURT OF PENNSYLVANIA

NO. 0151 CAPITAL APPEAL DOCKET

[Filed October 15, 1997]

COMMONWEALTH OF PENNSYLVANIA	)
	)
vs.	)
	)
JOSEPH KINDLER, APPELLANT	)
	)

BRIEF AND REPRODUCED RECORD FOR APPELLANT

Brief and Reproduced Record on Behalf of Appellant Joseph J. Kindler in Support of an Appeal from an Order of the Court of Common Pleas of the First Judicial District denying and dismissing Appellant's Petition for Relief Under the Post Conviction Relief Act.

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Exhibit "B" - Appellant's PCRA Petition filed January 11, 1996.

Exhibit "C" - Docket Entry of the lower court dated August 15, 1996 granting the Commonwealth's Motion to Dismiss Appellant's PCRA Petition.

Exhibit "D" - Notice of Appeal filed by the undersigned on behalf of the Appellant on September 10, 1996.

Exhibit "E" - Opinion authored by Judge Lineberger dated July 23, 1997 (eight pages).

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STATEMENT OF JURISDICTION

This is a direct appeal from an Order of the Court of Common Pleas of Philadelphia wherein Appellant's Petition for Post Conviction Relief was dismissed without a hearing. Under 42 C.P.S.A. § 9546(d), such matters are reviewable by the Supreme Court of Pennsylvania because this is a capital case.

STATEMENT OF THE QUESTIONS PRESENTED

Did the lower court abuse its discretion in dismissing Appellant's PCRA petition on the basis of the fugitive disentitlement doctrine where there was no present connection between Appellant's former fugitive status and the ability of the lower court to review his collateral claims?

STATEMENT OF THE CASE

This matter arises from a criminal homicide which occurred in Philadelphia on July 24, 1982 wherein a David Bernstein was the victim. Your Appellant, Joseph Kindler, along with a codefendant named Scott Shaw, was arrested for this offense as well as for the offenses of conspiracy and kidnaping as per Court of Common Pleas of Philadelphia, August Term, 1982, Nos. 2747 - 2750.

On November 15, 1983, the Appellant was convicted by a jury following a trial before the Honorable John Geisz of Murder of the First Degree, Kidnaping and Conspiracy. On November 16, 1983, the jury returned a verdict as to the sentence: death by lethal injection.

Post-trial motions were filed on November 28, 1983. On September 20, 1984, the Appellant escaped from custody.[1] On October 10, 1984, because of Appellant's then fugitive status, the Commonwealth filed a motion asking Judge Geisz to dismiss Appellant's pending post-verdict motions, which motion was granted on October 23, 1984.

Appellant was subsequently apprehended in Canada and extradited to the United States. On October 3, 1991, Judge Geisz denied Appellant's request for reinstatement of post-verdict motions and formally imposed sentence as to Bill No. 2750, in which the Appellant had been convicted of Murder of the First Degree, to wit, death by lethal injection. As to Bill No. 2747 in which the Appellant had been convicted of Kidnaping, Judge Geisz sentenced the Appellant to a term of not less than 10 nor more than 20 years imprisonment, to run consecutively to the sentence imposed in Bill No. 2750. On Bill No. 2748, in which the Appellant had been convicted of Criminal Conspiracy, Judge Geisz sentenced the Appellant to a term of not less than 5 nor more than 10 years imprisonment, said sentence to run concurrently with the sentence imposed on Bill No. 2750.

On October 22, 1991, the Appellant filed a Notice of Appeal pro se to this Honorable Court. On February 9, 1994, a plurality of this Court, in an Opinion announcing the judgment of the Court authored by Mr.

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[1] Appellant notes that in his Opinion below, Judge Lineberger has stated that a guard was attacked as a result of Appellant's escape (page 6). This is not correct: no guard was attacked in connection with Appellant's escape from prison.

Justice Papadokos, affirmed the judgment of sentence. **Commonwealth vs. Kindler**, 639 A.2d 1 (Fa. 1994). A subsequent Petition for a Writ of Certiorari was denied by the Supreme Court of the United States, 115 S.Ct. 327 (1994).

The present Petition for Relief under the Post Conviction Relief Act was filed on January 11, 1996. The matter was assigned to the Honorable James A. Lineberger, Judge of the Court of Common Pleas of Philadelphia. The Commonwealth filed a Motion to Dismiss which Judge Lineberger granted, following an oral argument and the submission of memoranda from each side, on August 15, 1996.

On September 10, 1996, a Notice of Appeal to this Honorable Court was duly filed in the lower court by present counsel.

Annexed hereto as Exhibit "A" is a true and correct copy of the docket entries from the lower court.

Annexed hereto as Exhibit "B" is a true and correct copy of Appellant's PCRA Petition filed January 11, 1996.

Attached herewith as Exhibit "C" is a true and correct copy of the docket entry of the lower court dated August 15, 1996 granting the Commonwealth's Motion to Dismiss Appellant's PCRA Petition.

Attached herewith as Exhibit "D" is a true and correct copy of the Notice of Appeal filed by the undersigned on behalf of the Appellant on September 10, 1996.

Finally, annexed hereto as Exhibit "E" is a true and correct copy of the Opinion authored by Judge Lineberger dated July 23, 1997 (eight pages).

STATEMENT OF THE STANDARD OF REVIEW

Did the lower court commit an abuse of discretion in dismissing Appellant's PCRA Petition based upon the fugitive disentitlement doctrine?

SUMMARY OF THE ARGUMENT

The dismissal of Appellant's PCRA Petition on the basis of the fugitive disentitlement doctrine was an abuse of discretion because there was no present connection between his 1984 - 1991 fugitive status and the lower Court's ability to review the merits of his claims in a 1996 collateral attack. The Appellant was then before the Court to answer to its judgment, his earlier fugitive status no longer threatened the dignity of the Court of Common Pleas and the prosecution could not show actual prejudice should his claims be heard on their merits. Furthermore, this Court has irregularly and inconsistently applied the fugitive disentitlement doctrine which thereby precludes its application as a procedural bar against Appellant. In addition, refusal to review Appellant's claims on their merits would be inconsistent with this Court's doctrine of "relaxed waiver" in capital cases. Thus, this dismissal was not a reasonable response to Appellant's prior fugitive status.

Therefore, the action of the lower court has resulted in a denial of Appellant's right to due process of law. This Court should remand for a hearing on the merits of all of Appellant's claims. To deny him such relief

would be a manifest injustice, for it will lead to Appellant's execution without a court having ever ruled upon the propriety and fairness of the very proceedings that resulted in his death sentence.

ARGUMENT

THE LOWER COURT ABUSED ITS DISCRETION IN GRANTING THE COMMONWEALTH'S MOTION TO DISMISS APPELLANT'S PETITION UNDER THE POST CONVICTION RELIEF ACT WITHOUT A HEARING ON THE BASIS OF THE FUGITIVE DISENTITLEMENT DOCTRINE.

The instant petition under the Post Conviction Relief Act was filed on January 11, 1996, some five years after Appellant's apprehension and return to custody in this jurisdiction. In that Petition, annexed hereto as Exhibit "B", Appellant alleges that he was deprived of the effective assistance of trial counsel in failing to present evidence at the death penalty hearing which would have supported a finding of mitigating circumstances (to wit, that the Appellant had been raised in a troubled and domestically chaotic household wherein he was repeatedly subject to long time abuse, both verbally and physically).[2] Appellant has further alleged that trial counsel was ineffective in failing to seek a severance of the death penalty hearing from that of his codefendant Scott Shaw. In addition, Appellant has contended that the attorney who represented the Appellant in post verdict motions failed to raise these allegations of ineffective

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[2] The jury found that the Appellant had failed to prove any mitigating circumstances.

assistance on the part of trial counsel. Finally, Appellant contended in that Petition that he was entitled to an adjudication on the merits of all the claims that had been raised on his behalf in the previous direct appeal to this Honorable Court, which were not considered on their merits because of the fugitive disentitlement doctrine.

In that ruling, Mr. Justice Papadokos, speaking for a plurality of the Court, held that Petitioner's previous escape warranted both the dismissal of his initial post verdict motions as well as the refusal of the trial judge to permit their reinstatement. In addition, Justice Papadokos announced that the merits of the claims raised in post verdict motions would not be addressed by this Honorable Court, nor would there be a remand order to the lower court to consider such claims as were now being advanced by new counsel, in view of Appellant's escape. Therefore, since in the view of Justice Papadokos no issues had been properly preserved before the lower court, only the mandatory issues required for review by 42 P.C.S.A. § 9711(h) would be addressed.

In an application for reargument filed on February 23, 1994 with this Honorable Court, the Appellant contended that Justice Papadokos' Opinion effectively emasculated the policy set forth by the United States Supreme Court in **Ortega-Rodriguez vs. United States**, 113 S.Ct 1199 (1993), which held that a claim of error on appeal should not be dismissed unless there is a clear connection between the Appellant's former fugitive status and the present appellate process. Appellant argued that, even if Judge Geisz had properly exercised his discretion in refusing to reinstate post verdict motions subsequent to

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Appellant's recapture, there was no present connection between Appellant's previous escape from custody and the opportunity of the Supreme Court of Pennsylvania to review his appeal. In that regard, the Appellant cited cases in which the Supreme Court of Pennsylvania had reviewed issues that had been waived at lower court proceedings because the matter involved the death penalty, such as **Commonwealth vs. Zettlemoyer**, 454 A.2d 937 (Pa. 1982) and **Commonwealth vs. Pirela**, 507 A.2d 23 (Pa. 1986).

Nevertheless, this Court saw fit to deny the Application for Reargument and a subsequent Petition for Writ of Certiorari was denied by the United States Supreme Court.

In the present PCRA, the Appellant contended that he was deprived of the effective assistance of prior counsel for the failure to present certain mitigating evidence at the sentencing hearing in this case, including and most especially testimony of family members, all of whom were present at the sentencing hearing, concerning an extensive history of domestic violence and abuse during Appellant's formative years, as well as expert testimony in support thereof. Appellant contended that at any evidentiary hearing that the lower court might allow in support of the Petition for PCRA Relief, Appellant would present testimony to establish the existence of such mitigating circumstances, and attached affidavits from the witnesses in question.

In addition, Appellant contended that prior counsel were ineffective in failing to advance and preserve a claim that there should have been a severance at the

sentencing hearing of Appellant's case from that of his codefendant, Scott Shaw.

Nevertheless, Judge Lineberger ordered that Appellant' s Petition would not be heard based upon Appellant's previous escape. On that basis alone, Judge Lineberger concluded that Appellant had waived his right of collateral review.

In Petitioner's Memorandum of Law in response to the Commonwealth's Motion to Dismiss his PCRA Petition, the Appellant argued that his claims should be heard on their merits at this time because there was no longer any meaningful connection between his prior escape and the PCRA Court's opportunity to provide review of those claims, and in support thereof cited this Court's decision in **Commonwealth vs. Peter Huff**, 658 A.2d 1340 (Pa. 1995). In **Huff**, the issue that was presented was whether the Defendant had waived his appellate rights regarding review of the denial of post conviction relief as the result of his having become a fugitive. In an Opinion by now Chief Justice Flaherty, the Court held that the Superior Court had erred in dismissing Huff's appeal. In that case however, unlike the instant case, the lower court had chosen to ignore the Appellant's flight and had ruled on the issues on their merits. This Court concluded that in holding that Mr. Huff had waived his appellate rights, including the right to seek collateral relief, the Superior Court had erred.

In **In the Interest of J.J.**, 668 A.2d 1176 (Pa. Super. 1995), the Superior Court was responding to a Supreme Court remand order. This Court at 656 A.2d 1355 (Pa. 1995) had vacated the Superior Court's early decision in the **J.J.** case and had remanded for the

purpose of determining whether discretion should be exercised in the defendant's favor to hear his appeal despite a prior escape. In J.J.'s case, the defendant had been adjudicated delinquent and had filed a timely appeal; subsequently, the defendant escaped and was apprehended thereafter. The Superior Court had initially ordered the appeal to be quashed because of the Defendant's former fugitive status.

Once on remand, the Superior Court determined that it would exercise its discretion by permitting the appeal to be heard on the ground that there was no longer a present connection between the Defendant's former fugitive status and the ability of the appellate court to dispose of the appeal. In accord, see **Commonwealth vs. Corino**, 659 A.2d 556 (Pa. 1995)(reversing order of Superior Court quashing appeal, based on **Huff,** supra.)

In the case of **Degen vs. United States**, 116 S.Ct. 1777 (1996), the United States Supreme Court held that a district court cannot grant summary judgment against a claimant in a forfeiture proceeding for failure to appear in a related criminal prosecution. The Court made it clear that disentitlement is not automatically available in a civil case where the party seeking relief has become a fugitive in a related criminal prosecution. The concern of the court in **Degen** was that a fugitive should not suffer disentitlement absent some great prejudice to others. **Empire Blue Cross vs. Finkelstein, et al,** 111 F.3d 278 (2nd Cir. 1997).

The United States Supreme Court concluded that once a fugitive has been recaptured, dismissal of his appeal is not justified as long as the Defendant is in fact before the court to answer to its judgment, his

earlier fugtive status no longer threatens the dignity of the court and the prosecution has not shown 'actual prejudice" should the appeal be heard. A decision on the appeal which precluded review of the merits of the former fugitive's claim would be harsh, arbitrary and excessive absent a clear necessity for such a result.

The Appellant therefore respectfully submits that as a matter of due process of law under both the United States and Pennsylvania Constitution, there exists an outer boundary within which any escape rule must function in order to be congruent with substantive due process, and that boundary appears to be that there must exist a rational connection between the former fugitive status of the Appellant and the present court process. See **Woods vs. Kemna,** 13 F.3d 1244 (8th Cir. 1994).

In the instant case, the Appellant respectfully submits that the lower court has abused its discretion in dismissing his PCRA Petition without a hearing since Appellant was back in custody well before the PCRA was submitted and there is nothing in the record to indicate that Appellant's former fugitive status had substantially compromised the ability of the lower court to engage in effective and meaningful review of the issues presented in his collateral attack. **In the Interest of J.J.** at 1179; **Commonwealth vs. Bond**, 1997 Pa. Super. Lexis 809 (1997).[3]

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[3] See **Commonwealth vs. Borger,** 682 A.2d 329 (Pa. Super. 1996), where the Superior Court held that that Appellant's request for reinstatement of post verdict motions was properly refused by the trial court, based upon a previous escape, because such an action "does not operate to extinguish judicial review of his life sentence. Appellant may still petition for review under the

In addition, Appellant notes that the appellate courts of Pennsylvania have inconsistently, irregularly and arbitrarily applied the fugitive disentitlement doctrine in past cases. Under § 9543(a)(3) of the PCRA, there can be no finding of waiver where the waiver would not constitute a state procedural default under federal habeas corpus law. Federal habeas law provides that a state rule which is discretionary, rather than mandatory in its application, does not constitute "an adequate and independent basis" to support a procedural default. **Sullivan vs. Little Hunting Park**, 396 U.S. 229, 223 (1969); **Harris vs. Reed**, 489 US. 255 (1989). In **Johnson vs. Mississippi**, 486 U.S. 578 (1988) and **Ford vs. Georgia**, 498 U.S. 411 (1991), the United States Supreme Court held that in order to be "adequate" to support a procedural default, a state rule must be "firmly established and regularly followed by the time as of which it is to be applied". Petitioner respectfully submits that the Pennsylvania fugitive disentitlement doctrine does not meet these standards and therefore cannot be used to support a conclusion that Appellant has waived his right to collateral review.

In **Doctor vs. Walters**, 96 F.3d 675 (3d Cir. 1996) the Court of Appeals ruled that the holding of the district court that the fugitive forfeiture rule bars federal habeas review of Doctor's claims was erroneous because that rule does not constitute "an independent and adequate state procedural rule", citing the above

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Post Conviction Relief Act. . . Accordingly, as appellant is fully eligible under 42 P.C.S.A. §9543(a) to petition for a PCRA hearing the only effect the denial of the reinstatement of his post verdict motions has is to maintain the effect of the original dismissal. .

noted principles. In reaching that result, the Court of Appeals examined Pennsylvania case law to determine whether the fugitive disentitlement rule had been regularly applied as of the date of the waiver that allegedly occurred when the defendant escaped in 1986 (in our case, the Appellant escaped in September of 1984).

After reviewing several key cases of the Pennsylvania Supreme Court, the opinion of Judge O'Neill for the Court of Appeals concluded that at the time of Doctor's escape, Pennsylvania law afforded state appellate courts different degrees of discretion depending upon the posture of the appeal upon a former fugitive's return to custody. Accordingly, the Court of Appeals concluded that it was not then firmly established that Pennsylvania courts lacked the discretion to hear an appeal first filed after custody had been restored, which is the situation in the instant case.

In accord is **Clark vs. Pennsylvania**, 892 F.2d 1142, 1149 (3d Cir. 1989) and **Bond vs. Fulcomer**, 864 F.2d 306 (3d Cir. 1989).

Finally, the Appellant respectfully submits that since this is a capital case, the Appellant should be given the benefit of the **Zettlemoyer rule** which has been applied in so many other instances by the Supreme Court of Pennsylvania, including cases under the Post Conviction Relief Act. This doctrine of "relaxed waiver" permits the review of claims in capital cases even if there has been a procedural default in the history of the case. See **Commonwealth vs. DeHart**, 650 A.2d 38, 48 (Pa. 1994); **Commonwealth vs. Yarris**, 549 A 2d 513 (Pa.

1988); **Commonwealth vs. Travaglia**, 661 A.2d 352, 356 (Pa. 1995); and **Commonwealth vs. Beasley**, 678 A.2d 773 (Pa. 1996).

In **Banks vs. Horn, et al**, No. 96-9003 (3d Cir. 9/19/97), the case of **Commonwealth vs. Banks**, 656 A.2d 467, 470 (Pa. 1995) was considered by the United States Court of Appeals for the Third Circuit. Banks claimed that the district court, which denied him federal habeas relief, had erred in finding that the relaxed waiver standard applicable to death penalty cases in the state courts in Pennsylvania could not apply to second or subsequent PCRA Petitions. In analyzing that issue, the opinion of Judge Greenberg for the Court held that it is possible in any death penalty case that the Supreme Court will not refuse to entertain the claims based upon the relaxed waiver doctrine. In reviewing the history of such matters before this Court, the Court of Appeals observed that in many cases this Court had effectively looked beyond the normal criteria of waiver in cases involving the death penalty. In conclusion, the Court of Appeals ruled that the Pennsylvania Supreme Court does not apply its procedural bar rules consistently in death penalty cases. (Opinion at page 13). The Court expressly noted that in **Beasley**, supra, and **Commonwealth vs. Szuchon**, 633 A.2d 1098 (Pa. 1993), the Supreme Court of Pennsylvania addressed the merits of claims which seemingly were precluded by the then applicable PCRA provisions. Accordingly, Banks' appeal was rejected because he had failed to exhaust his state court remedies since it was not at all clear that the Pennsylvania courts would not entertain his claims on collateral attack despite certain procedural bars.

In the instant case, the lower court was presented with a **first** PCRA Petition filed on Appellant's behalf raising claims of ineffective assistance of counsel, includmg claims of sentencing error and other issues that have not been addressed on their merits by any reviewing court.[4]

Accordingly, the Appellant respectfully submits that the lower court has abused its discretion in refusing to entertain all of the claims advanced in Appellant's Petition under the PCRA since this is capital case wherein the "relaxed waiver" doctrine

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[4] In Judge Lineberger's Opinion in Footnote 2, the lower court finds that additional issues raised in Appellant's PCRA Petition, not previously advanced in Appellant's initial direct appeal to ths Court, were "not cognizable" because the Appellant had not previously raised those claims, citing § 9544(b) of the PCRA. Appellant respectfully observes, however, that a claim of ineffective assistance on the part of prior counsel cannot be disposed of on direct appeal unless the grounds upon which the claim is based appear of record; where the claim requires an evidentiary hearing, at which point testimony could be taken to establish such a record, then the matter is not to be deemed waived merely because it was not raised at the earliest opportunity by new counsel, in view of the paucity of the record. Accordingly, the Appellant respectfully submits that since these additional claims could not have been raised on direct appeal because the grounds upon which those claims were based did not appear of record, such issues were not waived. **Commonwealth vs. Williams**, 418 A.2d 499, 502 (Pa. Super. 1980); **Commonwealth vs. House**, 537 A.2d 361 (Pa. Super. 1988); **Commonwealth vs. Pizzo**, 602 A.2d 823 (Pa. 1992); **Commonwealth vs. Crawley**, 663 A.2d 676 (Pa. 1995); **Commonwealth vs. Kelvin Morris**, 684 A.2d 1037 (Pa. 1996) (Footnote 11). In any event, the doctrine of "relaxed waiver" in capital cases contemplates that these issues would nevertheless be addressed on their merits.

should have been (but was not) followed. In any event, there certainly has been no state procedural default which would bar federal habeas review as discussed in § 9543(a)(3) in view of what has been recognized by the United States Court of Appeals for the Third Circuit as this Court's inconsistent, irregular and arbitrary application of its waiver doctrines.

In conclusion, the Appellant respectfully submits that under the decision of the United States Supreme Court in **Ortega-Rodriguez**, supra, as a matter of federal procedural and substantive due process of law, the denial of the Appellant's right to have an adjudication by a reviewing court, either in direct or collateral attack, of the merits of his claims of the denial of a fair trial, a fair sentencing proceeding and effective assistance of counsel violates his constitutional rights, especially where there exists in Pennsylvania a state constitutional right to an appeal as set forth in Article V, § 9 of the Pennsylvania Constitution and as recognized by this Court in **Commonwealth vs. Wilkerson**, 416 A.2d 477 (Pa. 1980) and subsequent cases.

Appellant contends therefore that due process of law requires that the prosecution establish, before it can properly persuade a lower PCRA court to exercise its discretion in favor of a dismissal, that there be clear evidence of a nexus between the Appellant's former fugitive status and the PCRA case then pending before the court. Without such a showing, refusal to grant collateral review is not only "inadequate" to support a procedural default, it is an unconstitutional and unreasonable deprivation of due process. In the instant case, the previous plurality ruling of this Court, refusing to address the merits of Appellant's claims on

direct appeal, was, in Appellant's respectful submission to this Court, an improper application of the fugitive disentitlement doctrine. In the present PCRA petition, the Appellant has again been refused the opportunity to have his claims reviewed by the courts. These results constitute a fundamental miscarriage of justice, for to permit the Appellant to face execution by lethal injection without ever having his claims of error reviewed on their merits would surely constitute a violation of basic and fundamental constitutional norms such as would offend the sense of fairness of any court of justice. As the United States Supreme Court observed in **Degen**, supra, such a remedy for an escape wherein the Appellant was returned to custody some six years ago would be arbitrary, excessive and far "too rough".

For these reasons therefore, the Appellant Joseph Kindler respectfully prays that the Supreme Court of Pennsylvania reverse the ruling of the Court of Common Pleas of the First Judicial District in this case and remand this matter to the lower court with a directive that all of Appellant's claims are to be heard on their merits.

CONCLUSION

For all of the reasons advanced herein, the Appellant respectfully submits that this Honorable Court should reverse the ruling of the lower court and grant appropriate relief in the interest of justice.

Respectfully Submitted,

/s/ A. Charles Peruto, Sr.
A. CHARLES PERUTO, SR., ESQUIRE

/s/ Burton A. Rose
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Attorneys for Appellant

* * *

[CERTIFICATE OF SERVICE OMITTED IN PRINTING OF THIS APPENDIX]

* * *

[EXHIBITS OMITTED IN PRINTING OF THIS APPENDIX]

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 151 CAPITAL APPEAL DOCKET

[Filed December 29, 1997]

COMMONWEALTH OF PENNSYLVANIA, Appellee	)
v.	)
JOSEPH KINDLER	)

BRIEF FOR APPELLEE

Appeal From The August 9, 1996 Order Of The Court Of Common Pleas Of Philadelphia County, Trial Division, Criminal Section, At Information Nos. 2747, 2748, 2750, August Term, 1982, Denying Defendant's Petition Under The Post Conviction Relief Act (PCRA).

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STATEMENT OF THE QUESTIONS PRESENTED

A. Is defendant's effort to relitigate his forfeiture of his claims, affirmed by this Court on direct appeal, barred by the law of the case doctrine?

(Answered in the affirmative by the PCRA court).

B. Was the PCRA court obliged to consider the merits of forfeited claims under § 9543 (a) (3) (iii) of the former PCRA statute, on the ground that "fugitive forfeiture" is insufficient to bar federal habeas corpus review?

(Answered in the negative by the PCRA court).

3. Is review of defendant's forfeited claims required by "substantive due process"?

(Answered in the negative by the PCRA court).

4. Can defendant's forfeiture of his claims be relitigated on collateral review under a "relaxed waiver" theory?

(Answered in the negative by the PCRA court).

STATEMENT OF THE CASE

In 1982, defendant kidnapped and murdered a witness against him in a burglary case. He was tried, convicted of murder in the first degree, and sentenced to death in 1983. In 1984 he escaped from prison and fled to Canada. There he was recaptured, escaped again, was recaptured again, and was extradited in 1991.

On direct appeal in 1994, this Court affirmed the trial court's ruling that defendant had forfeited his claims as a result of his flight.

Defendant filed a petition under the Post Conviction Relief Act (PCRA) , which was denied He now appeals once again to this Court. His sole claim is that the PCRA court erred in reaching the same conclusion reached by this Court, and mandated by this Court s own decision: viz., that he had preserved no claims for review. As this Court's 1994 ruling is the law of the case, the PCRA court properly held that defendant's attempt to dispute it was previously litigated, and that his PCRA claims were waived.

On April 4, 1982, defendant and two accomplices burglarized the Sound Odyssey store in Lower Moreland Township, Bucks County. A Lower Moreland Township officer saw a car with its lights out leaving the Sound Odyssey store at a high rate of speed. Three men were inside. The police were able to stop the car, but the driver -- defendant -- fled. The officers arrested the two passengers, sixteen-year-old Scott Shaw, and David Bernstein (N.T. 11/3/83, 5, 12, 20-23; N.T. 11/7/83, 108).

Following his arrest, David Bernstein revealed to the police that defendant had been the driver of the car, and that defendant had proposed and led the burglary. He agreed to testify against defendant and Shaw (N.T. 11/3/83, 5-9, 48; Ex. C-20, C-21).

Defendant was arrested and charged with multiple theft-related offenses in Philadelphia and two neighboring counties, as well as the Sound Odyssey burglary. He soon learned that David Bernstein was

planning to testify against him. Defendant decided to murder Bernstein to prevent him from testifying (N.T. 11/4/83, 50-51; N.T. 11/7/83, 8-9; N.T. 11/10/83, 73).

Between 2:30 and 2:45 a.m. on July 25, 1982, defendant armed himself with a baseball bat and had an accomplice, Michelle Raifer, ring Bernstein's doorbell. When the victim answered the door and began to talk to Raifer, defendant emerged from a nearby alleyway and struck the victim in the head with the bat at least twenty times. A second accomplice -- Shaw, the accomplice in the burglary -- assisted by attacking the victim with an electric cattle prod (N.T. 11/3/83, 150-53, 157, 162; 11/4/83, 40-42, 51-57, 68-69; N.T. 11/7/83, 10-11, 48, 53-54, 96, 178; N.T. 11/9/83, 34-38).

Defendant and Shaw dragged the semiconscious victim to Raifer' s car, leaving a thirty-foot long trail of blood, and locked him in the trunk. They then drove to the Delaware River and tried to throw him in. Defendant complained that the victim "wouldn't go under," and had to fill the victim's lungs with water and tie a cinder block around his neck (N.T. 11/2/83, 143-150; 11/3/83, 140-46, 153; N.T. 11/4/83, 42-48 59-60, 62; N.T. 11/7/83, 5-16; 11/9/83, 11-20).

On the way back from the river, defendant told Raifer to stop the car. He ordered Shaw to throw items connected with the murder, including defendant's black baseball bat and the clothes and shoes he and Shaw wore during the murder, into various storm sewer inlets on Grant Avenue. Police later recovered from those sewer inlets defendant's blood-stained black baseball bat, the black turtleneck shirt and black jogging pants and shoes that he had worn during the

attack, and the T-shirt and shoes Shaw had worn in assisting him (N.T. 11/3/83, 165-68, 178-80; N.T. 11/4/83, 45, 48, 54, 65-69; N.T. 11/7/83, 4-5, 13-14; N.T. 11/9/83, 12, 39-40, 52-54). Later, Shaw and defendant tried to wash the blood out of Raifer's trunk, using a styrofoam cooler to carry the water. They then broke up the cooler, and threw it and the trunk mat into another sewer inlet. Police later recovered from that inlet defendant's blood-stained and broken styrofoam cooler and the trunk mat, as well as the swim trunks defendant and Shaw had been wearing as they forced their victim into the river (N.T. 11/3/83, 172-77; N.T. 11/4/83, 45-47, 65-68; N.T. 11/9/83, 11, 47).

Within a few hours of the murder, police picked up Raifer as she drove her still blood-stained car. She confessed and led the police to the evidence in the sewer inlets. The next day, Bernstein's body surfaced on the Delaware River, the cinder block still tied to its neck. He had died from massive head injuries and drowning (N.T. 11/2/83, 109, 118, 124-135; N.T. 11/3/83, 150-155; 11/4/83, 47, 71; 11/7/83, 17-38, 218-26; N.T. 11/9/83, 7-10).

Defendant was tried with Shaw by a jury before the Honorable John A. Geisz. On November 15, 1983, the jury found both defendants guilty of murder in the first degree, kidnapping and conspiracy. In the penalty phase the jury found two aggravating circumstances (murdering a witness and murder during another felony) and no mitigating circumstances, and returned a sentencing verdict of death. It sentenced Shaw, a minor, to life imprisonment.

Defendant escaped while his post-trial motions were pending. On the night of September 19, 1984, he

broke out of the maximum security block of the Philadelphia Detention Center and became a fugitive from justice.[1] He remained at large, evading a Philadelphia arrest warrant, an F.B.I. fugitive flight warrant, and an alert to police nationwide. On October 10, 1984, the Commonwealth filed a petition to dismiss defendant's post-verdict motions. On October 23, 1984, after an evidentiary hearing, Judge Geisz found that defendant's voluntary escape forfeited his post-verdict rights, and dismissed his post-verdict motions. The court continued formal sentencing until further notice.

Defendant fled to Canada. He was arrested seven months later, on April 26, 1985, near St. Adèle in the Province of Quebec, on criminal charges and immigration charges. On July 3, 1985, the United States requested extradition, which defendant strenuously resisted.

On August 30, 1985, the Quebec Superior Court refused to prevent extradition, committing defendant to custody to await the decision of the Minister of Justice of Canada. On January 17, 1986, the Minister of Justice ordered final extradition. Defendant filed an application to review the Minister's decision in the Federal Court of Canada.

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[1] Defendant's escape was engineered by having one inmate create a diversion by flooding his cell, having a second inmate attack a guard, and having a third inmate take defendant's place in his cell, while defendant and the first inmate fled through a sawed-out barred window and climbed over the razor-wire fence (N.T. 10/23/84, 12-24, 43-44, 62-63, 78).

While that appeal was pending, defendant escaped again -- this time from the Parthenais Prison in Montreal on October 23, 1986.[2]

Defendant remained a fugitive for almost two more years. In September 1988, after defendant was featured on "America's Most Wanted," he was spotted and arrested in St. John, Province of New Brunswick, Canada.

Defendant's challenge to the ruling of the Minister of Justice was dismissed by the Federal Court of Canada, by the Federal Court of Appeal of Canada, and ultimately by the Supreme Court of Canada on September 26, 1991. He was returned to Philadelphia that day.

Defendant celebrated his return by demanding reinstatement of his post-verdict motions, as well as credit for time "served" in Canada. On October 3, 1991, Judge Geisz declined these requests, formally imposed the jury's sentence of death, and added a consecutive ten to twenty year sentence for kidnapping, with a concurrent five to ten year sentence for conspiracy.

On direct appeal to this Court, defendant argued that it was an abuse of discretion for Judge Geisz to refuse to reinstate his post-verdict motions, which had included various assertions of ineffective assistance of trial counsel, alleged prosecutorial misconduct, and trial court error. This Court held that the trial court

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[2] Defendant effected this escape by breaking through a prison skylight and lowering himself thirteen stories to the ground. Another inmate fell to his death in the attempt.

had not abused its discretion, and that defendant had preserved no allegations of error, direct or collateral. After reviewing the statutorily-required issues mandated by 42 Pa.C.S. § 9711 (h) (review of death sentence), this Court affirmed the judgments of sentence on February 9, 1994. Reargument was denied on April 8, 1994. The United States Supreme Court denied certiorari on October 11, 1994.

On July 11, 1996 -- thirteen years after his conviction -- defendant filed a PCRA petition raising several of the claims that this Court had held waived in 1994, as well as new assertions of ineffective assistance of trial and post-verdict counsel. On August 15, 1996, the Honorable James A. Lineberger dismissed this petition, on the ground that this Court had already ruled on direct appeal that defendant had waived all of his claims; and that waived or previously litigated claims are not cognizable under the PCRA (Opinion, Lineberger, J., 4-5).

In this appeal of the PCRA court's order, defendant essentially seeks to relitigate the issue of his forfeiture of his claims by his escape and absconding to a foreign country. This is the same issue decided against him by this Court on direct appeal.

Defendant's appeal fails on multiple levels. This Court's 1994 ruling is the law of the case and cannot be relitigated; previously litigated claims could not be considered by the PCRA court in any event; nor could the PCRA court decide substantive claims that defendant could have raised, but instead forfeited, on direct appeal. Since by virtue of this Court's own ruling in this same case there was nothing to review,

the PCRA court correctly dismissed defendant's petition. Its disposition should be affirmed.

SUMMARY OF ARGUMENT

Following defendant's escape 1984, the trial court held a hearing and determined that defendant had forfeited his claims. In 1991 defendant was recaptured and returned to the United States. This Court upheld the trial court's ruling on direct appeal in 1994.

Defendant's present attempt to dispute his forfeiture of his claims via collateral review runs afoul of the law of the case doctrine. In essence, he argues that this Court erred in upholding the trial court's forfeiture ruling on direct appeal. That ruling, however, is the law of the case, and cannot be reconsidered. A party cannot forever relitigate an appellate decision in his own case with which he disagrees. This Court's ruling on direct appeal is final.

Contrary to defendant's understanding, his 1984 forfeiture is "an independent and adequate" state-law default, and so was unreviewable under the former version of the PCRA in which a waiver can be overcome if insufficient to bar federal habeas corpus review. As explained by the federal court in Doctor v. Walters, application of the "fugitive forfeiture" rule in the circumstances of this case would constitute an adequate and independent state-law ruling barring review in federal habeas corpus.

Defendant's attempts to invoke a dubious "substantive due process" theory, and to claim relief under the so-called "relaxed waiver rule," are similarly

barred. Defendant forfeited his claims becase he chose escape over litigation. His choice is final.

ARGUMENT

DEFENDANT'S FORFEITURE OF HIS CLAIMS CANNOT BE RELITIGATED.

1. Defendant's claims are barred by the law of the case doctrine.

On October 23, 1984, the trial court held that defendant had forfeited his post-trial claims via his ongoing flight. In Commonwealth v. Kindler, 536 Pa. 228, 639 A.2d 1 (1994) (plurality), this Court affirmed the trial court's ruling under Commonwealth v. Passaro, 504 Pa. 611, 476 A.2d 346 (1984) (fugitive who forfeited claims in Superior Court not entitled to reinstatement when later recaptured), noting that "one who invokes the jurisdiction of a tribunal and then flees has voluntarily waived or disentitled himself to call upon the resources of the Court for a determination of his claims." 639 A.2d at 3. Instantly, the PCRA court applied this Court's ruling on direct appeal in dismissing defendant's PCRA claims, holding that they had been waived.[3]

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[3] Defendant argues that the PCRA court "abused its discretion" (Brief for Appellant, 8). This, of course, is a non-sequitur. The cognizability requirements of the PCRA are a matter of law, not discretion. The applicable version of the PCRA required, as a condition of eligibility for relief, that the petitioner's allegations of error had not been waived. 42 Pa.C.S. § 9543(a)(3). An issue is waived "if the petitioner failed to raise it and if it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or other proceeding actually conducted or in a prior

The essence of defendant's present appeal is his complaint that the trial court's 1984 ruling that he had forfeited his claims, which was affirmed by the direct-appeal ruling of this Court in this same case, was "an improper application of the fugitive disentitlement doctrine" (Brief for Appellant, 20). This very claim, however, was decided by this Court on direct appeal. Consequently, defendant's arguments seeking to reopen the question may not be reached. As recently reiterated for the Court by Justice Cappy: "'It is hornbook law that issues decided by an appellate court on a prior appeal between the same parties become the law of the case and will not be reconsidered' on a subsequent appeal on another phase of the same case." Commonwealth v. Tilghman, 543 Pa. 578, 673 A.2d 898, 903 n. 8 (1996).[4]

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proceeding actually initiated under this subchapter." 42 Pa.C.S. § 9543(b).

[4] E.g., Commonwealth v. Mulholland, 65 W.D. Misc. Dkt. 1997 (Pa., October 10, 1997), slip opinion at 19 & n.6; Commonwealth v. Starr, 541 Pa. 564, 664 A. 2d 1326 (1995); Rosen v. Rosen, 520 Pa. 19, 549 A.2d 561 (1988); Delaware River Port Authority v. Pa. P.U.C., 408 Pa. 169, 182 A.2d 682 (1962); Ondovchik v. Ondovchik, 421 Pa. 20, 218 A.2d 578 (1966); Commonwealth v. Tick, Inc., 431 Pa. 420, 246 A.2d 424 (1968); Burke v. Pittsburgh Limestone Corp., 375 Pa. 390, 100 A.2d 595 (1953).

The Opinion Announcing the Judgment of the Court in Kindler was that of a plurality. That, however, goes only to whether the decision is binding on other parties in other cases. This Court's prior ruling in this case is final as to defendant. Commonwealth v. Tilghman, 543 Pa. 578, 673 A.2d 898 (1996) (court's decision may or may not be binding in other cases, but is always binding on parties before it).

Defendant seeks to rely on later plurality decisions handed down after his direct appeal was decided. Under the law of the case doctrine, these later decisions cannot be considered.[5] Moreover, they are inapposite. In April 1995, the plurality in In Re. J.J., 540 Pa. 274, 656 A.2d 1355 (1995), considered a Superior Court ruling that quashed the appeal of an appellant who had been a fugitive, but who had been returned to custody before the motion to quash was ruled upon. Relying on Commonwealth v. Galloway, 460 Pa. 309, 333 A.2d 741 (1975) (forfeiture not already imposed is discretionary after fugitive has

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Moreover, the opinions in Kindler contain little that would help defendant even if he could relitigate his forfeiture. There was no dispute that defendant had forfeited his rights; the opinions differed only on the question -- here hypothetical -- of what circumstances should permit a forfeiture to be set aside. The opinion of Chief Justice Nix, Justice Montemuro, and Justice Papadakos maintained that willful flight barred such a result. The concurring opinion of Justice Cappy, joined by Justices Zappala and Flaherty, agreed that defendant's forfeiture must stand "under the instant facts," though reinstatement should in theory be allowed for a "compelling reason." Justice (now Chief Justice) Flaherty concurred separately that any "compelling reason" should be "of the most extraordinary nature, "but he too noted that such reasons were "not present in this case."

[5] These plurality rulings equally could not be considered by the PCRA court because, to the extent they departed from Passaro, they were inapplicable on collateral review. Commonwealth v. Gillespie, 512 Pa. 349, 516 A.2d 1180 (1986) (new rule stated after direct appeal decided inapplicable on collateral review). Further, the issue of whether defendant had previously forfeited his claims (thus waiving them for purposes of the PCRA) was barred by 42 Pa.C.S. § 9543(a)(3), because it had been previously litigated. Finally, defendant cannot rely on later plurality decisions in other cases, since only majority opinions have the force of precedent. Commonwealth v. Tilghman, 673 A.2d at 903.

been returned to custody), the plurality ruled that after the fugitive had been returned to custody, the lower court could thereafter impose forfeiture as a sanction for his flight only as a matter of discretion. Since it appeared that the Superior Court might instead have applied Passaro (ecaptured offender not entitled to reinstatement of claims forfeited during his flight), the case was remanded for further proceedings. Similarly, in Commonwealth v. Huff, 540 Pa. 535, 658 A.2d 1340 (1995), the plurality reversed the Superior Court for quashing an appeal of an appellant presently in custody, solely because he had previously been a fugitive before the trial court.[6]

This case -- as this Court ruled on direct appeal -- is controlled by Passaro, not Galloway. The trial court held a hearing and ruled that defendant forfeited his post-trial claims, in October 1984, while defendant was a fugitive. At that time, Passaro, which had been decided in May 1984, was (and is) directly on point and controlling. Thus, this Court's application of Passaro on direct appeal is not only incontestable under the law of the case doctrine, but incontestably correct.

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[6] Defendant also seeks to rely on Ortega-Rodriguez v. United States, 113 S. Ct. 1199 (1993). That case was extensively argued on direct appeal, and was cited in both the opinion of the Court and the concurring opinions. It properly did not change the result. As explained in the Commonwealth's briefs on direct appeal, Ortega says nothing about federal constitutional law, and is precedent only in federal courts. The United States Supreme Court's exercise of its supervisory authority over lower federal courts cannot overturn Pennsylvania law. If a state law is not in violation of the federal constitution, the United States must accept that law as final and authoritative. E.g., Gooding v. Wilson, 405 U.S. 518, 520-21 (1972).

Defendant is not entitled to relief where the forfeiture was imposed by the court below during his flight.[7]

It should be noted that defendant has never claimed to possess evidence of actual innocence. Generally, a waiver under the PCRA can be overcome by asserting ineffective assistance (an option foreclosed to defendant, since he, not his attorneys, decided he should flee), or by presenting after-discovered evidence of actual innocence. Such evidence might qualify as the kind of "compelling reason . . . of the most extraordinary nature" alluded to by Justice (now Chief Justice) Flaherty in his concurring opinion on direct appeal. But as also noted in that same opinion, such a claim is "not present in this case." The PCRA court ruled correctly.

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[7] Defendant also seeks to rely on Degen v. United States, 116 S. Ct. 1777 (1996), in which the United States Supreme Court exercised its supervisory power to hold that a lower federal court had abused its discretion in dismissing an action for return of property solely because the plaintiff was a fugitive in the criminal prosecution in which his property had been seized. The court noted, inter alia, that the subject of the proceeding was not the plaintiff himself, but the property; and that dismissal is appropriate in such circumstances in a criminal action. Degen is obviously inapposite. This is an appeal from collateral review of defendant's murder conviction, not a related civil action regarding his property. Further, how the United States Supreme Court chooses to supervise lower federal courts in discretionary matters is irrelevant to this case, which concerns issues of statutory law under the PCRA.

2. Defendant's forfeiture was a valid state-law procedural default under the PCRA.

Defendant contends that, notwithstanding this Court's direct-appeal ruling, the lower court erred in finding his forfeited claims waived for purposes of his PCRA petition. He argues that his forfeiture is not "a state procedural default under federal habeas corpus law" (Brief for Appellant, 14). This argument relies on § 9543 (a)(3)(iii) of the version of the PCRA statute that applied when defendant filed his petition. This provision stated that a petitioner could be eligible for relief where:

> If the allegation of error has been waived, the waiver of the allegation during pretrial, trial, post-trial or direct appeal proceedings does not constitute a State procedural default barring Federal habeas corpus relief.

42 Pa.C.S. § 9543 (a)(3)(iii).

According to defendant, the recent case of Doctor v. Walters, 95 F.3d 675 (3d Cir. 1996), holds that "the fugitive forfeiture rule" in Pennsylvania does not bar federal habeas review, because it is not "an independent and adequate state procedural rule" (Brief for Appellant, 15). Thus, the argument goes, if defendant's forfeiture is not a bar to federal habeas review, that should have negated his waiver under 42 Pa.C.S. § 9543 (a)(3)(iii).

The short answer to this claim is that defendant did not merely waive his claims, he forfeited them. They are unpreserved by virtue of his own decision to

dispense with the review process. In any event, Doctor does not support his theory, but refutes it.

In Doctor, the federal court recognized that there are two standards of fugitive forfeiture under Pennsylvania law. One, based on Galloway, permits forfeiture to be imposed as a matter of discretion after recapture; the other, based on Passaro, prohibits reinstatement if forfeiture was imposed during the fugitive's flight. The federal court in Doctor held that where the Galloway standard applies -- that is, where a fugitive is returned to custody before the state court has imposed forfeiture -- there is no "firmly established and regularly followed" rule in Pennsylvania, because in that case forfeiture is discretionary. Where, however, the Passaro standard applies -- as here, where the fugitive is returned to custody after the state court ruled that he forfeited his claims during his flight -- the federal court noted that Pennsylvania law affords no discretion to rescind the forfeiture; and that the latter rule is "firmly established and regularly followed." 96 F.3d at 683-685:

> Passaro, however, did not overrule Galloway. We therefore do not read Passaro to eliminate the discretion conferred in Galloway. Rather, we read the absence of any discretionary language in Passaro to reflect the important distinction between the two cases: the status of appeal upon recapture. Thus, Passaro, while leaving undisturbed Galloway's grant of discretion as to whether to dismiss a pending appeal, declined to confer the same discretion as to whether to reinstate a previously dismissed appeal. **Therefore, Pennsylvania's fugitive forfeiture rule after Passaro can be**

> **described as follows: if the defendant is returned to custody while his appeal is pending, an appellate court has the discretion to hear the appeal, but if the defendant is returned to custody after the appeal is dismissed an appellate court lacks the discretion to reinstate and hear the appeal.** See Jones, 564 A.2d at 936 ("the factual distinctions between Galloway and Passaro would still suggest that the forfeiture analysis of Passaro would not apply to situations . . . where the defendant was returned to Pennsylvania authorities while their appeals were still pending").
>
> It is clear from these decisions, which reflect the state of the law at the time of petitioner's escape, that Pennsylvania law afforded appellate courts different degrees of discretion depending on the posture of the appeal upon a former fugitive's return to custody. Pennsylvania law had never confronted the situation that arises in the instant case where petitioner's flight had ended and custody had been restored before the appellate process was ever initiated. Thus, it was not "firmly established" that Pennsylvania courts lacked the discretion to hear an appeal first filed after custody had been restored.

Emphasis added.[8]

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[8] As already noted, defendant does not claim to have evidence of actual innocence. A state procedural default can be overcome in federal habeas corpus by a showing of cause and prejudice (not a

Here, the trial court -- which functions as an appellate court with respect to post-trial motions -- ruled in October 1984 (five months after this Court decided Passaro), while defendant was still a fugitive, that he had forfeited his claims. Defendant was returned to custody in 1991; then, as now, Pennsylvania law afforded no discretion to reinstate his previously-forfeited claims. E.g., Commonwealth v. Judge, 530 Pa. 403, 609 A.2d 785 (1992) ("a defendant who elects to escape from custody forfeits his right to appellate review . . . once the defendant has fled, his subsequent return or recapture does not provide a basis for reinstating his appeal") (citing Passaro; italics omitted). On direct appeal this Court, citing Passaro, affirmed the trial court's ruling. Since the forfeiture here was imposed under the Passaro standard, Doctor v. Walters establishes that this forfeiture is an adequate and independent state ground, and bars review of defendant's forfeited claims in federal habeas corpus. Thus, for purposes of the PCRA statute, defendant's waived claims remain waived.[9]

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viable option here, since defendant engineered his forfeiture by his own efforts), or by showing actual innocence. McCleskey v. Zant, 499 U.S. 467, 498, 111 S. Ct. 1454, 1472 (1991). Since defendant cannot show cause and prejudice or actual innocence, his default cannot be overcome in federal habeas corpus.

[9] It should be noted that it is totally irrelevant whether the federal court's analysis of Pennsylvania law is "correct," since the sole relevant question for purposes of the PCRA provision in question is whether defendant's claims are eligible for federal review. Doctor conclusively establishes that they are not. Therefore, even if one were to attempt to dispute the federal court's reasoning (though no reasonable basis for such dispute exists), the fact remains that, since defendant's claims are barred from federal

3. Defendant's due process argument is barred and meritless.

Defendant argues that, as a matter of "substantive due process,"[10] there must be a rational connection between his former fugitive status and his forfeiture of his claims in the present proceeding (Brief for Appellant, 13-14). Aside from the fact that this argument is simply another effort to relitigate what was decided on direct appeal, and so barred by the law of the case doctrine, it is without merit.

The rational connection to which defendant refers is obvious. Indeed, it was fully explained by this Court on direct appeal. He forfeited his appellate claims by fleeing. Because he had no preserved claims, there was nothing for this Court to review on direct appeal except those issues mandated by statute. In the PRCA

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habeas review, they were also barred from PCRA review under § 9543 (a)(3)(iii).

Defendant claims that Doctor is in accord with Clark v. Pennsylvania, 892 F.2d 1142 (3d Cir. 1989), cert. denied, Castille v. Clark, 496 U.S. 942 (1990), and Bond v. Fulcomer, 864 F.2d 306 (3d Cir. 1989). Actually, these cases are simply not on point. In Clark, there was no finding of fugitive forfeiture in the state court, and so the issue here was not reached. Bond is even less apposite, as it discussed whether an untimely allocatur petition exhausted a previously unraised claim, and whether dismissal of the petition constituted a state procedural default. To the extent Bond is somehow relevant, moreover (although it is impossible to see how), it was implicitly overruled by Castille v. Peoples, 489 U.S. 346, 109 S. Ct. 1056 (1989) (claim raised for first time in dismissed allocatur petition does not meet federal habeas exhaustion requirements).

[10] See Lochner v. New York, 198 U.S. 45 (1905).

proceeding, defendant again had no preserved claims, and so his petition was properly dismissed.

The point of defendant's argument appears to be that it would be more "rational" for the effect of his 1984 forfeiture to diminish over time, or to vary inversely with the number of appeals or collateral attacks he attempts. The opposite, however, is true. Defendant's actions reveal him as a nihilist with respect to the very procedures he belatedly seeks to invoke. He struck at the very heart of the criminal justice system by murdering a witness against him, and did so again by escaping and fleeing to another nation (where he escaped again) in an effort to avoid punishment. It is eminently fair that these actions should result in forfeiture of any and all claims defendant could have preserved, had he not attempted to destroy the working of the criminal justice system in his own case. If substantive due process is defined as fundamental fairness, it is fundamentally fair for defendant to reap what he has sown.

The sole authority cited by defendant for his substantive due process argument is Woods v. Kemna, 13 F.3d 1244 (8th Cir. 1994). That case, however, merely contains dicta to the effect that Missouri presumably would not impose a fugitive forfeiture without a hearing to determine why the offender had failed to appear at his sentencing hearing. 13 F.3d at 1245-46. Here, there was an evidentiary hearing before the trial court, which ruled that defendant had forfeited his claims by his escape and ongoing flight. The real essence of due process, of course, is the opportunity to be heard. Since that was afforded here, defendant was afforded due process.

4. The relaxed waiver rule does not negate defendant's forfeiture.

Finally, defendant contends that the merits of his claims should be reached under the so-called "relaxed waiver rule," as stated in Commonwealth v. Zettlemoyer, 500 Pa. 16, 50 n.19, 454 A.2d 937, cert. denied, 461 US. 970 (1983) (Brief for Appellant, 16). In Zettlemoyer, this Court explained that a "relaxed waiver rule" was created for capital cases "due to the final and irrevocable nature of the death penalty," which might deny the appellant the opportunity to seek collateral review and raise ineffectiveness claims.

That defendant's claims are unreviewable as a consequence of his forfeiture is, as already noted, the law of the case. His claims were not forfeited due to lack of opportunity to raise them; or due to their mere omission on direct appeal; but due to his refusal to preserve them. He chose escape over litigation. That this is a capital case has no bearing on the resulting forfeiture. E.g., Commonwealth v. Judge (Passaro rule applies in capital cases). By its terms, the "relaxed waiver rule" does not apply to such forfeitures (if it did, it would have applied in Judge, and on direct appeal in this case).[11]

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[11] Defendant adds that several of his claims "could not have been raised on direct appeal because the grounds upon which those claims were based did not appear of record" (Brief for Appellant, 18 n.4).

This argument is a non-sequitur. Regardless of whether there was a basis for a given claim in the record on direct appeal, that claim had already been forfeited by defendant's flight.

In essence, defendant is simply asking this Court once again to change its mind. As already noted, however, his forfeiture of his claims is the law of the case, and cannot be reconsidered. The PCRA court should be affirmed.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests this Court to affirm the ruling of the PCRA court.

Respectfully submitted,

/s/ Hugh J. Burns, Jr.
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In any event, defendant has the law backwards. A claim of ineffective assistance must be raised at the first opportunity, regardless of the record. If the record is not sufficient to resolve the issue, it is the defendant's burden to offer to prove facts necessary to support the claim.

Defendant of course knows this; he demonstrated this knowledge on direct appeal. In his direct appeal brief to this Court, defendant requested a remand for a hearing, and noted that he was raising issues "which were never presented at all to the lower Court, generally as a result, it is alleged here, of ineffective assistance of counsel" (Direct Appeal Brief for Appellant, 54).

Since defendant was perfectly capable of raising, and actually raised, claims on direct appeal for which there is no basis in the record, he cannot ask to be excused of his forfeiture on the ground that he was unable to raise the claims he forfeited.

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Supreme Court, U.S.
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No. 08-992

In The
Supreme Court of the United States

JEFFREY A. BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL.,
Petitioners,

v.

JOSEPH J. KINDLER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX, VOL. 2 of 2

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Third Circuit Opinion,
Joseph J. Kindler v. Martin Horn, et al., Nos. 03-9010 & 03-9011
Filed September 3, 2008
Amended September 29, 2008 ..... App. 1

Pennsylvania Supreme Court
Opinion, Direct Appeal, *Commonwealth v. Joseph J. Kindler*, No. 155 E.D. Appeal Docket 1991
Filed February 9, 1994 ..... App. 79

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 151 CAPITAL APPEAL DOCKET

[Filed December 23, 1998]

COMMONWEALTH OF PENNSYLVANIA, Appellee,	)
v.	)
JOSEPH KINDLER, Appellant.	)

APPELLANT'S APPLICATION FOR REARGUMENT

Application for reargument from the opinion and order of the Supreme Court of Pennsylvania, dated December 11, 1998

A. CHARLES PERUTO, ESQUIRE
BURTON A. ROSE, ESQUIRE
Washington West Building
235 South 8th Street
Philadelphia, PA 19106
(215) 925-5800

(Counsel for Appellant)

PRELIMINARY STATEMENT

Citations in this brief follow the procedure authorized by this Court. All citations are either self-explanatory or otherwise explained. All emphasis in this brief is supplied unless otherwise indicated.

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STATEMENT OF JURISDICTION

Jurisdiction is based upon Rules 2541-2546 of the Pennsylvania Rules of Appellate Procedure, which provide for reargument of decisions of this Court. This application is being filed within fourteen days of this Court's order and is timely under the Rules of Appellate Procedure.

ORDER FROM WHICH REARGUMENT IS SOUGHT

Reargument is sought from the decision of this Court, rendered on December 11, 1998, affirming the dismissal of Mr. Kindler's appeal. A copy of this Court's opinion is appended hereto as Exhibit 1.

REARGUMENT SHOULD BE GRANTED BECAUSE THIS COURT'S REFUSAL TO CONSIDER ANY OF MR. KINDLER'S SUBSTANTIVE CLAIMS IS INCONSISTENT WITH ITS OPINIONS IN COMMONWEALTH V. PASSARO AND COMMONWEALTH V. DEEMER

This Court should grant reargument because its refusal to consider any of Appellant's substantive claims is inconsistent with two other opinions of this Court, including one that was issued while the instant appeal was pending. Commonwealth v. Passaro, 504 Pa. 611, 476 A.2d 346 (1984); Commonwealth v. Deemer, 550 Pa 290, 705 A.2d 827 (1997).

In Commonwealth v. Passaro, 504 Pa. 611, 476 A.2d 346 (1984), this Court held that the Superior Court had correctly refused to reinstate the appeal of

a fugitive defendant, who had been recaptured after his appeal had been quashed due to his fugitive status. Passaro's holding turned on the timing of the fugitive's return to Pennsylvania and the particular procedural history of his case:

> Pennsylvania's fugitive forfeiture rule after Passaro can described as follows: if the defendant is returned to custody while his appeal is pending, an appellate court has the discretion to hear the appeal, but if the defendant is returned to custody after the appeal is dismissed an appellate court lacks the discretion to reinstate and hear the appeal.

Doctor v. Walters, 96 F.3d 675, 685 (3d Cir. 1996) (quoting Commonwealth v. Jones, 388 Pa.Super. 22, 564 A.2d 983, 986 (1989) ("forfeiture analysis of Passaro would not apply to situations ... where the defendant was returned to Pennsylvania authorities while their appeals were still pending")).

Here, as Mr. Kindler had been returned to Pennsylvania even before his direct appeal was filed, this Court was in error when it failed to follow Passaro and refused to consider Mr. Kinder's substantive direct appeal claims -- including those alleging ineffective assistance of counsel, prosecutorial misconduct, and violations of Mills v. Maryland.[1]

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[1] On direct appeal, this Court held that it would not consider Mr. Kindler's substantive appellate claims, because those claims had not been preserved for appellate review. Commonwealth v. Kindler, 639 A.2d 1, 4, 536 Pa. 228 (1994). However, at the time of Mr. Kindler's trial and direct appeal -- and indeed, for some, time afterwards -- this Court employed its "relaxed waiver"

Recently -- and while the instant appeal was pending -- this Court squarely held that a fugitive defendant is entitled to participate in the appellate process, provided that he had been returned to the court's jurisdiction:

> [A] fugitive who has returned to the jurisdiction of the court should be allowed to exercise his post-trial rights in the same manner he would have done had he not become a fugitive. If he returns in time for post-trial motions, he should be allowed to file them. If he returns after the time for post-trial motions has expired, his request to file post-trial motions or to reinstate post-trial motions should be denied. If he became a fugitive between post-trial motions and an appeal and he returns before the time for appeal has expired and files an appeal, he should be allowed to appeal. If he returns after the time for filing an appeal has elapsed, his request to file an appeal should be denied. If he becomes a fugitive after an appeal has been filed, his appeal should be decided and any fugitive status should be addressed separately. In short, a fugitive who returns to court should be allowed to take the system of criminal justice as he finds it upon his return: if time for filing has elapsed, he may not file; if it has not, he may.

---

doctrine to consider claims in capital cases that might otherwise be technically barred from review. See e.g., Commonwealth v. DeHart, 539 Pa. 5, 25, 650 A.2d 38, 48 (1994).

Commonwealth v. Deemer, 550 Pa. 290, 295-296, 705 A.2d 827, 829 (1997) (footnote omitted).[2]

Under Deemer, Appellant ant is clearly entitled to merits review: he was returned to Pennsylvania before formal sentencing, and well before his direct appeal to this Court. Accordingly, this Court should grant reargument and, following Passaro and Deemer, consider the merits of Mr. Kindler's direct appeal claims and the substantive claims raised in Mr. Kinder's post-conviction challenge.

CONCLUSION

For the reasons stated above, and for the reasons stated in Mr. Kindler's previous submissions to this Court, reargument should be allowed, the Court should vacate Judge Lineburger's order dismissing Mr. Kindler's PCRA petition, and/or should consider all of Mr. Kindler's substantive claim -- including those presented on direct appeal. In the alternative, this Court should vacate Judge Lineburger's order dismissing Mr. Kindler's PCRA petition, reinstate Mr. Kindler's direct appeal rights nunc pro tunc, and order re-briefing.

RESPECTFULLY SUBMITTED,

/s/ Burton A. Rose

A. CHARLES PERUTO, ESQUIRE
BURTON A. ROSE, ESQUIRE

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[2] Thus, Deemer specifically abrogated the Court's holding in Appellant's direct appeal. See Deemer, 550 Pa. at 294-295, 705 A.2d at 828-829.

Washington West Building
235 South 8th Street
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Dated: December 23, 1998

* * *

[CERTIFICATE OF SERVICE OMITTED IN PRINTING OF THIS APPENDIX]

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 151 CAPITAL APPEAL DOCKET

[Filed December 30, 1998]

COMMONWEALTH OF PENNSYLVANIA Appellee	)
V.	)
JOSEPH KINDLER	)

ANSWER TO APPLICATION FOR REARGUMENT

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT:

LYNNE ABRAHAM, District Attorney of Philadelphia County, by her Assistants, RONALD EISENBERG, Deputy, Law Division, CATHERINE MARSHALL, Chief, Appeals Unit, and HUGH J. BURNS, JR., Assistant District Attorney, respectfully answers defendant's December 22, 1998, application for reargument. For the following reasons, reargument should be denied.

On December 11, 1998, this Court affirmed the order of the PCRA court denying collateral relief. The PCRA court ruled that defendant had forfeited all of his claims on direct appeal as a result of his escape and flight to Canada, had so had preserved no claims

for PCRA review. On appeal from the PCRA court's ruling, this Court affirmed, holding that the PCRA court was indeed compelled by this Court's ruling on direct appeal. As a previously litigated issue, that direct-appeal ruling could not be revisited.

In his instant petition, defendant simply repeats the same argument on which he relied in appealing the PCRA court. He claims that this Court's ruling in his direct appeal, which compelled the ruling of the PCRA court, was "inconsistent" with this Court's other decisions, including ones reached after his direct appeal became final.

Repeating an argument that this Court considered and rejected in the appeal, however, can hardly be a ground for reargument. Pa.R.A.P. 2543 states that reargument is appropriate only for "compelling reasons." The note following the Rule illustrates what is "compelling" -- e.g., where the Court has "overlooked or misapprehended a [material] fact of record"; or overlooked "a controlling or directly compelling authority"; or where controlling authority relied on by the Court has been overruled or reversed. Where, as here, the Court has clearly considered a litigant's position and rejected it, it is not a ground for reargument that the litigant continues to assert the same rejected position.

Aside from the fact that defendant's reiteration of his rejected position is not a ground for reargument, he continues to ignore the law of the case doctrine. Even in the appeal itself, defendant had no ability to relitigate this Court's ruling in the prior appeal. Commonwealth v. Tilghman, 543 Pa. 578, 673 A.2d 898, 903 n. 8 (1996).

In any event, defendant's persistent claim that affirmance of the PCRA court's ruling is "inconsistent" with relevant caselaw is simply incorrect. In Commonwealth v. Passaro, 504 Pa. 611, 476 A.2d 346 (1984), this Court held that a fugitive who forfeited claims in Superior Court was not entitled to reinstatement when later recaptured. Here, defendant forfeited his post-trial claims when he escaped from custody during post-trial motions and fled to another nation. At that time, appellate claims had to be preserved for review in post-trial motions. E.g., Commonwealth v. Metz, 534 Pa. 341, 633 A.2d 125 (1993). As a result of his escape, defendant had no preserved claims when his direct appeal was considered; only statutory review unique to capital cases was required. Commonwealth v. Judge, 530 Pa. 403, 609 A.2d 785 (1992). This Court properly relied on Passaro (as it had done in Judge) in so ruling on direct appeal in this case in 1994. These rulings are consistent, not inconsistent.

Defendant's further claim of inconsistency is that, because he was involuntarily returned to custody before his direct appeal was filed (i.e., his flight had delayed resolution of his post-trial claims for several years), he is entitled to the benefit of the new rule in Commonwealth v. Deemer, 550 Pa. 290, 705 A.2d 827 (1997) (holding that a fugitive may henceforth pursue an appeal if he returns before the appeal is filed). Deemer, which was not cited in defendant's brief, was decided four years after his direct appeal was decided on February 9, 1994. Indeed, Deemer was decided even after defendant's PCRA petition was denied on August 15, 1996. It is not "inconsistent," therefore, that defendant could not rely on Deemer on appeal from denial of his PCRA petition. Commonwealth v.

Gillespie, 512 Pa. 349, 516 A.2d 1180 (1986) (new rule stated after direct appeal decided inapplicable on collateral review).

WHEREFORE, defendant's application should be denied.

Respectfully submitted,

HUGH J. BURNS, JR.
Assistant District Attorney
CATHERINE MARSHALL
Chief, Appeals Unit
RONALD EISENBERG
Deputy District Attorney
LYNNE ABRAHAM
District Attorney

* * *

[CERTIFICATE OF SERVICE OMITTED IN PRINTING OF THIS APPENDIX]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 99 - CV - 161
Judge Joyner
THIS IS A CAPITAL CASE

[Filed December 17, 2002]

JOSEPH J. KINDLER,	)
	)
Petitioner,	)
	)
v.	)
	)
MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; DONALD T. VAUGHN, Superintendent of the State Correctional Institution at Graterford, and JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview,	)
	)
Respondents.	)

PETITIONER'S REPLY MEMORANDUM IN SUPPORT OF FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS

Pursuant to Eastern District Local Rule 9.4, Petitioner JOSEPH J. KINDLER, through

undersigned counsel, files his reply memorandum in support of his First Amended Petition for Writ of Habeas Corpus.

All emphasis herein is supplied unless otherwise indicated. Transcripts of Pennsylvania state court proceedings will be cited as "N.T. [date], at [page number]. The First Amended Petition for Writ of Habeas Corpus and Consolidated Memorandum of Law is cited as "*First Amended Petition.*" The Commonwealth's Response to Amended Petition for Writ of Habeas Corpus is cited as "*Response.*"

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ARGUMENT

I. PETITIONER TIMELY SOUGHT FEDERAL HABEAS RELIEF.

The Commonwealth contends that Petitioner failed to seek habeas relief within the one year statute of limitations provided by 28 U.S.C. § 2244(d). *Response* at 18-36. The Commonwealth's argument is meritless.

A. The Habeas Petition Was Timely Filed.

As Respondents admit, *Response* at 19, Petitioner's state post-conviction relief petition was pending on April 24, 1996. Accordingly, the AEDPA statute of limitations was tolled throughout the pendency of the state post-conviction relief petition. 28 U.S.C. § 2244(d)(2). The state post-conviction relief petition was pending until the Pennsylvania Supreme Court denied Petitioner's timely application for reargument, on March 15, 1999. Petitioner filed his habeas petition, styled *Amended Petition for Writ of Habeas Corpus*, on March 11, 2000. It was therefore timely.

The Commonwealth nevertheless argues that the petition was untimely, asserting that the state petition was not "pending," for purposes of § 2244(d)(2), during the times (a) between the Pennsylvania Supreme Court's decision, rendered December 11, 1998 and the filing of the reargument application on December 22, 1998; and (b) between the filing date and the denial of reargument on March 15, 1999.

Despite the Commonwealth's attempts to provide support for this argument, it is inconsistent with the language of § 2244(d)(2), with the decisions

interpreting that language, and with Pennsylvania appellate practice. The Commonwealth does not cite a single decision *holding* that the statute is not tolled during a timely filed, procedurally proper request for reconsideration, rehearing or reargument. Even the decisions that the Commonwealth claims support its argument actually refute the argument. The argument is baseless.

1. The Commonwealth's argument is contrary to § 2244(d)(2).

Section 2244(d)(1) provides in relevant part for a one year period of limitation for filing a federal habeas petition, to commence upon the conclusion of direct review. Section 2244(d)(2) provides as follows:

> The time during which a *properly filed* application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is *pending* shall not be counted toward any period of limitation under this subsection.

All of Petitioner's state court pleadings, including the reargument application, were "properly filed," *i.e.*, they were "delivered to, and accepted by" the appropriate court officials "in compliance with the applicable laws and rules governing filings," which are those rules governing such matters as the timeliness and form of the filings. Artuz v. Bennett, 531 U.S. 4, 8 (2000); accord Lovasz v. Vaughn, 134 F.3d 146, 148 (3d Cir. 1998).

Since Petitioner's original state post-conviction application was properly filed, and since his

subsequent appeal and application for reargument were properly filed, his application remained "pending" throughout the post-conviction review process, including the time periods between filings that are part of that process. That is the clear import of the statutory language.

The Commonwealth contends that § 2244(d)(2) should be read to include a requirement that tolling only continue during the pendency of proceedings *that are necessary to exhaust state remedies*. *Response* at 27-28. Such a reading of the statute is insupportable. Congress chose to toll the running of the statute during the times in which a "*properly filed* application for State post-conviction or other collateral review ... is *pending*," § 2244(d)(2), *not* the time during which a "properly filed" application for State review "necessary for the purposes of exhaustion," *Response* at 27-28, is pending. This Court should not read into the statute language not adopted by Congress.[1]

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[1] See, e.g., Artuz v. Bennett, 531 U.S. 4, 10 (2000) ("Whatever merits these and other policy arguments may have, it is not the province of this Court to rewrite the statute to accommodate them"); Williams v. Taylor, 529 U.S. 420, 431-32 (2000) (construe statute using actual language of statute; Congress could have used word other than "fail" if it intended to adopt no-fault standard); Bailey v. United States, 516 U.S. 137, 148 (1995) (statutory term "use" not construed to mean "possession"); Smith v. United States, 508 U.S. 223, 229 (statutory term "use" not construed to mean "use as a weapon"; "the words 'as a weapon' appear nowhere in the statute"); United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989) ("[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'") (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)).

Moreover, the construction urged by the Commonwealth would create serious practical difficulties. In O'Sullivan v. Boerckel, 526 U.S. 838, 847 (1999), the United States Supreme Court held that a habeas petitioner must ordinarily complete discretionary review in a state's highest court in order to exhaust his claims. In In re: Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases, No. 218 Judicial Administration Docket No 1 (Pa. May 9, 2000) (Order No. 218), the Pennsylvania Supreme Court ruled that seeking discretionary review through an allocatur petition to that Court is not required in order to exhaust state remedies. In Wenger v. Frank, 266 F.3d 218, 225-26 (3d Cir. 2001), the Third Circuit held that the Pennsylvania Supreme Court's ruling applies, if at all, only prospectively. The result of these rulings is that prior to Order No. 218, petitioners were *required* to file allocatur petitions in order to exhaust state remedies; after Order No. 218, petitioners *may or may not be* required to file allocatur petitions.

Under the Commonwealth's regime, a petitioner who files an allocatur petition – either in the belief that he had to do so under O'Sullivan or simply because he thought that he had claims meriting allocatur review and wished to give the Pennsylvania Supreme Court the opportunity to rule on them – would not have a "pending" application for state post-conviction review, if at some time in the future the Third Circuit or the United States Supreme Court decides that such a petition was not required after Order No. 218. As a result, his allocatur petition would not toll the running of the AEDPA statute of limitations. Given that such petitions are often pending for some period of time, such a rule would

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likely eliminate federal habeas review for petitioners who are diligently and timely seeking relief in state court.

Nothing in § 2244(d)(2) suggests that Congress intended for it to set such traps for habeas petitioners. Nor should this Court countenance an argument like the Commonwealth's that is both contrary to the language of the statute and would result in the setting of such traps.

2. The Commonwealth's argument is contrary to *Carey v. Saffold*.

The Commonwealth's argument is also contrary to the holding of Carey v. Saffold, 122 S. Ct. 2134 (2002). In Saffold, the State of California contended *inter alia* that a state post-conviction application was not "pending," and therefore did not toll the statute, "during the interval between a lower court's entry of judgment and the timely filing of a notice of appeal ... in the next court." Id. at 2138. The Supreme Court rejected that argument, in terms that mandate rejection of the Commonwealth's argument here:

> California's reading of the word "pending," however, is not consistent with that word's ordinary meaning. The dictionary defines "pending" (when used as an adjective) as "in continuance" or "not yet decided." Webster's Third New International Dictionary 1669 (1993). It similarly defines the term (when used as a preposition) as "through the period of continuance ... of," "until the ... completion of." Id. That definition, applied in the present context, means that an application is pending as

> long as the ordinary state collateral review process is "in continuance" – *i.e.*, "until the completion of" that process. In other words, *until the application has achieved final resolution through the State's post-conviction procedures, by definition it remains "pending."*

Id.

As the Court made clear by rejecting California's argument in Saffold, under § 2244(d)(2), a State application for post-conviction relief is "pending" from the initiation of proceedings until "final resolution" of the proceedings. As long as the petitioner's filings at the various stages of state court litigation are "properly filed," there are no gaps in the time during which the state court application is "pending." Id.; see also id. at 2141 (remanding for determination whether petitioner had complied with state timeliness rule, *i.e.*, whether the application was "properly filed").[2]

Once Petitioner filed his "properly filed" reargument petition, the Pennsylvania Supreme Court had another opportunity to reconsider its decision and either grant relief itself or remand for consideration of some or all of Petitioner's claims on the merits. Because it had the power to do so, there had been no

---

[2] Because the state court application is "pending" during the time periods between "properly filed" requests for relief at different stages of the litigation, the Commonwealth's contention, see *Response* at 30-32, that even if Petitioner's state court application was "pending" between the filing of the reargument petition and its disposition, it was still not "pending" between the initial denial of the PCRA appeal and the filing of the reargument petition, is flatly contrary to Saffold.

"final resolution" of the state court application for relief. Due consideration of the role of reargument in Pennsylvania appellate procedure makes this fact even more clear.

3. As a matter of Pennsylvania appellate procedure, there had been no final resolution of the state court application until reargument was denied.

There is no question that, while discretionary, reargument is part of Pennsylvania's established post-conviction and appellate procedures. See Pa. R.A.P. 2541, *et seq.* (setting forth procedures by which all appellants (with exceptions not relevant here) may request reargument). Under the Pennsylvania Rules of Appellate Procedure, any appellate party may seek reargument of any appellate decision, as long as the party files timely (Rule 2542), in the proper form (Rule 2541), and presents the grounds for the request accurately, clearly and briefly (Rule 2544(d)), without appending any brief in support of the application (Rule 2544(b)). The opposing party may file an answer in opposition (Rule 2545), but subsequent or untimely applications "will not be received." Rule 2547.

Reargument is a discretionary procedure (Rule 2543), but it will be granted "when there are compelling reasons therefor." Id. Indeed, it is by no means unheard of for the Pennsylvania Supreme Court to grant relief on reargument that was denied in the original appeal. See, e.g., Commonwealth v. Saranchak, 2002 WL 31628788 (Pa. Nov. 22, 2002) (on reargument, granting reinstatement of PCRA petition that had been dismissed on appeal); Commonwealth v. Young, 748 A.2d 166 (Pa. 2000) (on reargument,

granting relief on Bruton claim with respect to which relief was denied in original decision).

Thus, when a Pennsylvania post-conviction petitioner actually seeks reargument, his or her application has not "achieved final resolution through the State's post-conviction procedures," Saffold, 122 S. Ct. at 2138, until the denial of reargument.

This is confirmed by Pennsylvania's decisions concerning when a PCRA appeal is pending and has been finally resolved for purposes of its own post-conviction statute of limitations, 42 Pa. C.S. § 9545(b). Under § 9545(b)(1), a PCRA petition must ordinarily be filed within one year after the petitioner's judgment becomes final. There are, however, three exceptions to the statute. If petitioner shows that one of these exceptions extends the statute, his petition is timely, so long as it is "filed within 60 days of the date the claim could have been presented." 42 Pa. C.S. § 9545(b)(2).

In Commonwealth v. Lark, 746 A.2d 585 (Pa. 2000), the Court addressed the application of these provisions when a petitioner discovers a claim based on new evidence – which would support one of the statutory exceptions, 42 Pa. C.S. § 9545(b)(1)(ii) – while his original PCRA petition is on appeal. The Court held as follows:

> [W]hen an appellant's PCRA appeal is *pending* before a court, a subsequent PCRA petition cannot be filed until the resolution of review of the pending PCRA petition by the highest state court in which review is sought, or upon the expiration of the time for seeking such review.

Id. at 588. Petitioner's second PCRA petition, which was filed within sixty days of the denial of his PCRA appeal, was therefore timely. Id.

In Commonwealth v. Breakiron, 781 A.2d 94 (Pa. 2001), the petitioner argued that tolling should continue until after the United States Supreme Court's denial of certiorari. The Pennsylvania Supreme Court rejected that argument, holding that tolling continues while the petition is on appeal, *including reargument*:

> [T]he tolling arises from the trial court's lack of jurisdiction to entertain a second PCRA petition *while the first petition is on appeal to our Court*.... Here, our Court decided Appellant's first PCRA appeal on April 9, 1999, and reargument was denied on April 16, 1999.[3] Thus, *review of the pending PCRA petition "by the highest state court" concluded at that time*. Appellant's instant petition, filed March 23, 2000, does not fall within 60 days thereafter and his *Brady* claims are therefore untimely.

Id. at 99 (quoting Lark, 746 A.2d at 588).

Thus, Breakiron holds that review of a PCRA appeal is "pending," and the petition is "on appeal," until a filed reargument petition is ruled on, at which point the Court's review "conclude[s]." See also Commonwealth v. Kubis, 808 A.2d 196, 201 (Pa. Super. 2002) (direct appeal becomes final following

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[3] This is a typographical error. Actually, reargument was denied on August 16, 1999. See Commonwealth v. Breakiron, 556 Pa. 519, 729 A.2d 1088 (1999).

denial of reargument). Under Pennsylvania law, a petitioner's appeal remains pending, and there has been no final resolution of the appeal, until the appellate court's ruling on a timely filed application for reargument. Accordingly, under Saffold, there had been no "final resolution" of the state application for post-conviction relief until reargument was denied, and the AEDPA statute was therefore tolled continuously until that time.

4. The running of the statute is tolled while a "properly filed" request for reargument or reconsideration is pending.

For reasons similar to those set forth above, virtually every federal court to consider the issues has held that the AEDPA statute is tolled while a "properly filed" request for reargument or reconsideration is pending. See, e.g., Melancon v. Kaylo, 259 F.3d 401, 405 (5th Cir. 2001) (timely filed application for rehearing tolled limitations period); Crawley v. Catoe, 257 F.3d 395, 398 (4th Cir. 2001) (statute tolled until South Carolina Supreme Court denied request for rehearing); Emerson v. Johnson, 243 F.3d 931, 934-35 (5th Cir. 2001) (statute tolled until disposition of motion for reconsideration; motion was properly filed because Texas courts consider and sometimes grant such motions, even though Texas appellate rules purportedly prohibited such motions); Nyland v. Moore, 216 F.3d 1264, 1267 (11th Cir. 2000) (statute tolled even after motion for rehearing denied until mandate issues); Satterfield v. Johnson, 213 F. Supp. 2d 715, 719-23 (E.D. Pa. 2002) (DuBois, J.) (statute tolled while King's Bench petition and petition for reconsideration pending, even though King's Bench

remedy unavailable to petitioner); Gomez v. Duncan, 2002 WL 1424584, *3-*4 (S.D.N.Y. July 1, 2002) (reargument motion was permitted under New York rules; accordingly, motion was properly filed and statute tolled during pendency of motion); United States ex rel. Smith v. Sternes, 169 F. Supp. 2d 886, 888-89 (N.D. Ill. 2001) (statute tolled until motion for reconsideration denied; motion properly filed because Illinois Supreme Court entertains and sometimes grants such motions, even though no express provision for such a motion in court rules); Jones v. Harrelson, 2001 WL 530504, *4 n.2 (S.D. Ala. April 25, 2001) (statute tolled until application for rehearing denied); Rice v. Trippett, 63 F. Supp. 2d 784, 787 (E.D. Mich. 1999) (statute tolled during pendency of motion for reconsideration); United States ex rel. Cannon v. Page, 1999 WL 160268, *1 (N.D. Ill. Mar. 10, 1999) (statute tolled while motion for reconsideration pending).

The Commonwealth nevertheless contends that Petitioner's timely, properly filed reargument petition did not toll the running of the statute because it was not required for purposes of exhaustion. In support of its argument, the Commonwealth cites Nara v. Frank, 264 F.3d 310 (3d Cir. 2001); Stokes v. District Attorney of the County of Philadelphia, 247 F.3d 539 (3d Cir. 2001); and Swartz v. Meyers, 204 F.3d 417 (3d Cir. 2001). None of those decisions, however, actually support the Commonwealth's argument.

First, none of those decisions holds or even implies that only state proceedings *required* for exhaustion are "pending" within the meaning of § 2244(d)(2).

Second, Nara actually strongly implies the contrary result. In Nara, the petitioner filed and litigated to

completion two PCRA petitions. He then filed a third PCRA petition, which he later converted to a *nunc pro tunc* motion to withdraw his guilty plea, a request he made some twelve years after the plea had been accepted. Nara, 264 F.3d at 312-13. The statutory tolling issues before the Court concerned whether the statute should be tolled while the *nunc pro tunc* motion was pending, and whether it should be tolled after final denial of that motion, during times in which the petitioner could have (but did not) requested reargument or filed a petition for certiorari to the United States Supreme Court.

The Court found that the time should be tolled during all proceedings the petitioner actually filed with respect to his *nunc pro tunc* motion to withdraw guilty plea. It reasoned that the *nunc pro tunc* motion was "akin to an application for post-conviction or other collateral review," that the state courts had considered it, and that even though there is no express provision for such a *nunc pro tunc* motion in the Pennsylvania procedural rules, such motions have sometimes been accepted. Id. at 316. Accordingly, the motion was "properly filed," and it was "pending" until the Pennsylvania Supreme Court's final denial of the appeals relating to the motion. Id.

Paradoxically, the Commonwealth cites Nara in support of its argument that the tolling period under § 2244(d)(2) "does *not* include extraordinary, unusual or disfavored state procedures ... which are plainly not necessary for exhaustion purposes." *Response* at 29. This argument, however, is directly contrary to the actual holding of Nara. Nara had already alleged that he was incompetent at the time of his guilty plea in his two prior PCRA petitions. Id. at 312-13. Thus, his

nunc pro tunc motion was *not* necessary to exhaust that claim. Moreover, such a *nunc pro tunc* motion – which is not even provided for in the applicable rules – is clearly far more "extraordinary, unusual [and] disfavored" than is an application for reargument.

The Court's rejection of tolling during the time in which a petitioner could have (but did not) requested reargument also does not support the Commonwealth's argument. The Court ruled that the statute is tolled during the time in which a petitioner could have (but did not) file a pleading that is required in order to exhaust, id. at 319 (citing Swartz, 204 F.3d at 421-22), but that when a petitioner fails to actually seek reargument, then there is nothing "pending" once the appellate court has denied relief. Id. At the same time, the Court stated that if Nara (like Mr. Kindler) "had indeed filed a motion for reconsideration, that motion would be 'pending' in the Pennsylvania Supreme Court until it was decided by that court." Id. While this is *dicta*, it is *dicta* that expressly rejects the Commonwealth's argument.

Third, Stokes does not support the Commonwealth's argument. The primary reason why Stokes rejected tolling for the time in which the petitioner could have sought certiorari review from the United States Supreme Court is that a certiorari petition is a *federal* proceeding, not an "application for state post-conviction or other collateral review," § 2244(d)(2), as is required in order for the proceeding to toll the statute. Stokes, 247 F.3d at 542-43. Thus, Stokes is based on the express language of § 2244(d)(2), not on the Commonwealth's proceeding-

necessary-to-exhaust theory, which finds no support in the statutory language.[4]

Fourth, Swartz also fails to support the Commonwealth's argument. Swartz holds that the statute is tolled during the pendency of proceedings required for purposes of exhaustion, but it does *not* hold or imply that the statute is tolled *only* during the pendency of such proceedings. Swartz, 204 F 3d at 421-22. And the reason that Swartz rejected tolling while the petitioner's request for allowance of appeal *nunc pro tunc* was pending was not that it was an extraordinary request, but that it was untimely, and therefore not "properly filed." Id. at 424 n.6.

5. Conclusion

The Commonwealth's argument is contrary to the statutory language, inconsistent with Carey v. Saffold and with Pennsylvania appellate procedure, and has been rejected by virtually every federal court to consider such an argument. Acceptance of the argument would penalize Petitioner by denying him any federal habeas review because he availed himself of a procedure that is available to every party who appears before a Pennsylvania appellate court. This is not an attempt to curb abuse (see *Response* at 32); it is

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[4] This reading of Stokes is confirmed by the Third Circuit's very recent decision in Miller v. Dragovich, 2002 WL 31647877 (3d Cir. Nov. 25, 2002). In Miller, the petitioner sought tolling for the time during which his actually-filed certiorari petition was pending. The Court explained that this made no difference, because the certiorari petition was still a federal proceeding that could not toll the statute under § 2244(d)(2). Id. at *4-*5.

an attempt to create ever more arcane and deadly traps for habeas petitioners.

B. Petitioner Timely Commenced Habeas Proceedings on January 12, 1999, When He Filed His *McFarland* Motion.

Petitioner's federal habeas proceedings are timely even if the Court were to accept the Commonwealth's erroneous rehearing-does-not-toll argument. Petitioner initiated habeas proceedings on January 12, 1999, by filing a *Motion for Appointment of Federal Habeas Corpus Counsel under 21 U.S.C. § 848(q), a Stay of Execution, and Leave to Proceed in Forma Pauperis* ("*McFarland Motion*"). Filing the *McFarland Motion* timely initiated federal habeas corpus proceedings.[5]

In McFarland v. Scott, 512 U.S.849 (1994), the Supreme Court held that filing such a *McFarland Motion* "**initiate[s] a habeas corpus proceeding**" – i.e., "**a habeas corpus proceeding is pending**" as soon as a *McFarland Motion* is filed. McFarland, 512 U.S. at 857-58 (internal quotation marks omitted). Nothing in AEDPA or its legislative history suggests any Congressional intent to override or limit McFarland. Thus, it must be presumed that, under AEDPA, Congress intended to allow death-sentenced

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[5] According to the Commonwealth, Petitioner had one year from December 11, 1998 in which to commence federal habeas proceedings.

prisoners to initiate federal habeas corpus proceedings by filing a McFarland motion.[6]

Moreover, McFarland suggests additional reasons why filing the *McFarland Motion* stopped AEDPA's clock.

First, McFarland emphasized that a death-sentenced prisoner's right to qualified habeas counsel is "meaningless" unless counsel is given sufficient time to investigate, research and prepare the counseled habeas petition. Id., 512 U.S. at 857. In McFarland itself, the Court gave counsel this time by staying the prisoner's execution.[7]

Second, filing a *McFarland Motion* supplanted the pre-McFarland practice of requiring the prisoner to file a "perfunctory," "pro forma habeas petition" in order to invoke the federal court's jurisdiction and obtain appointment of counsel. See id. at 852 n.1. This pre-McFarland practice was dangerous for the prisoner, because it created "the substantial possibility that the petition might be dismissed on the merits, and that any habeas petition later filed would be dismissed summarily as an abuse of the writ." Id. Thus, a

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[6] Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990) (courts "assume that Congress is aware of existing law when it passes legislation"; pre-legislation court decisions control related issues in new legislation); Cannon v. University of Chicago, 441 U.S. 677, 696-97 (1979) (same).

[7] Justice O'Connor dissented from this aspect of McFarland. Id. at 859-60. The Commonwealth relies on her dissenting opinion, *Response* at 22, although it was rejected by the majority of the Court.

McFarland Motion serves the same purpose as a "perfunctory," "pro forma habeas petition," without creating the dangers attendant to such a petition. Since timely filing a "perfunctory," "pro forma habeas petition" would satisfy the statute of limitations, filing a *McFarland Motion* must also do so.

Because Petitioner commenced his habeas proceedings on January 12, 1999, not March 13, 2000, the Commonwealth's argument, which depends on the assumption that the AEDPA clock ran until March 13, 2000, is erroneous.[8]

C. Petitioner is Entitled to Equitable Tolling of the Statute of Limitations.

Even if this Court were to conclude (erroneously) that Petitioner was otherwise untimely in commencing federal habeas proceedings, the proceedings would still be timely under principles of equitable tolling.

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[8] The Courts of Appeal are divided on the question of whether a petitioner is entitled to pre-AEDPA review when s/he filed a McFarland motion before AEDPA's enactment, a question that is not presented herein. Compare Calderon v. United States District Court, 163 F.3d 530, 539-41 (9th Cir. 1998) (AEDPA review does not apply when McFarland motion filed pre-AEDPA), with Williams v. Coyle, 167 F.3d 1036 (6th Cir. 1999) (AEDPA applies unless habeas petition was filed pre-AEDPA); Peterkin v. Horn, 176 F. Supp. 2d 342, 356 (E.D. Pa. 2001) (same). Those decisions do not control here, where the question is whether filing the McFarland motion satisfied AEDPA's statute of limitations. Williams, 167 F.3d at 1040 n.4 ("[I]t is a separate question whether the filing of a motion for the appointment of counsel can satisfy the timeliness requirements that the AEDPA has imposed on habeas corpus petitioners, and we express no opinion on the matter.").

Equitable tolling applies to the AEDPA statute of limitations, as to other statutes of limitations. Miller v. New Jersey Department of Corrections, 145 F.3d 616, 618 (3d Cir. 1998). In general, equitable tolling is appropriate when the defendant has affirmatively misled the plaintiff; when the plaintiff has been prevented in some way from asserting her rights; and when the plaintiff has timely filed his action in a forum that turns out to be the wrong one, but the statute has run in the meantime. Burnett v. New York Central R. Co., 380 U.S. 424, 428-30 (1965); accord Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999) (providing similar list of circumstances). This list of circumstances is not exclusive. Kocian v. Getty Refining & Marketing Co., 707 F.2d 748, 753 (3d Cir. 1983).

Although the same general principles apply in capital cases, they should be applied with special care:

> In a capital case such as this, the consequences of error are terminal, and we therefore pay particular attention to whether principles of "equity would make the rigid application of a limitation period unfair" and whether the petitioner has "exercised reasonable diligence in investigating and bringing [the] claims."

Fahy v. Horn, 240 F.3d 239, 245 (3d Cir. 2001) (quoting Miller, 145 F.3d at 618).

As the Commonwealth acknowledges, Petitioner's properly filed state court application for post-conviction relief was pending from before April 24,

1996 until, at the earliest, December 11, 1998.[9] On December 22, 1998, Petitioner timely filed an application for reargument in the Pennsylvania Supreme Court. On January 12, 1999, Petitioner filed his *McFarland Motion*, requesting appointment of counsel and a stay of what Petitioner believed was the imminent signing of a warrant for his execution.

On February 8, 1999, this Court granted Petitioner's *McFarland Motion*. Respondents filed a motion for reconsideration, which this Court denied on March 11, 1999. Respondents then filed an appeal to the Third Circuit, arguing that this Court had erred in granting a stay of execution in the absence of a death warrant. Horn v. Kindler, No. 99-9002 (3d Cir.). Oral argument on the appeal was held in the Third Circuit on April 16, 2001. The appeal remained pending until April 25, 2001, when the Third Circuit vacated this Court's stay order without prejudice. While the appeal was pending, Petitioner filed in this Court his *Amended Petition for Writ of Habeas Corpus*, on March 11, 2000.

In these circumstances, Petitioner is entitled to equitable tolling for two interrelated reasons (should the Court reject Petitioner's arguments that the proceedings were timely commenced without the application of equitable tolling).

First, Petitioner reasonably believed that he was entitled to seek reconsideration of the Pennsylvania

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[9] As discussed above, Petitioner contends that it remained pending until his timely application for reargument was denied on March 15, 1999.

Supreme Court's decision in that Court. As discussed in Part A, supra, the Pennsylvania appellate rules provide a mechanism for seeking such relief, and the Pennsylvania Supreme Court has granted such relief in other cases. Thus, Petitioner's belief was "objectively reasonable." Fahy, 240 F.3d at 245. Petitioner reasonably, timely and diligently sought relief in that forum. Given those facts, the statute should be equitably tolled for the time during which the reargument application was pending, including the time between rejection of the appeal and the timely filing of the reargument application. Burnett, 380 U.S. at 435 (statute of limitations tolled while suit filed in wrong jurisdiction is pending); Fahy, 240 F.3d at 245 (statute tolled where petitioner filed in state court, reasonably believing filing necessary to exhaust).

Second, as discussed above, Respondents appealed from this Court's Orders of February 8 and March 11, 1999. The appeal took place well before the time limit for seeking federal habeas relief. The appeal also divested this Court of "the power to act, in all but a limited number of circumstances ...." Venen v. Sweet, 758 F.2d 117, 120 (3d Cir. 1985). Thus, it was an open question whether this Court had the authority to take any action on a habeas petition while the Commonwealth's appeal was pending in the Third Circuit. That, at any rate, would seem to be the view taken by this Court and the Commonwealth after the filing of the petition. This Court did not order the Commonwealth to respond to the petition, nor did Respondents attempt to do so of their own accord.

Petitioner filed the *Amended Petition* out of an abundance of caution, without any assurance that this Court even had jurisdiction to act on it, following the

Commonwealth's appeal of the stay order. Petitioner acted reasonably and diligently. The Commonwealth has not suffered the slightest prejudice from the fact that the petition was filed in March 2000 rather than December 1999, particularly since the Commonwealth made no effort to respond to the petition for over two years after it was actually filed. In these circumstances, equitable tolling of the statute is appropriate.[10]

II. ALL OF PETITIONER'S CLAIMS ARE EXHAUSTED.

As set forth in the *First Amended Petition* -- see id. at 3-9 (describing legal standards governing exhaustion), and discussion throughout of manner in which individual claims were exhausted – all of Petitioner's claims are exhausted.

The Commonwealth's *Response* contains a lengthy discussion of exhaustion principles, which is not tied to any discussion of particular claims. *Response* at 37-59. To the extent that this is simply a restatement of general principles, it requires no reply. The *Response*, however, confusingly and erroneously conflates principles of exhaustion and procedural default. Moreover, the *Response* also mistakenly contests the

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[10] See, e.g., Miller v. Beneficial Management Corp., 977 F.2d 834, 845 (3d Cir. 1992) ("Equitable tolling applies where the [defendant's] own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights. Furthermore, the contention that only egregious acts of active deception can toll the limitation period has no support in the law." (citations and internal quotation marks omitted)).

fact that many of Petitioner's claims are exhausted by operation of law.

In this Section of the *Reply*, Petitioner will first briefly restate the applicable principles governing exhaustion. Part II.A, *infra*. Petitioner will then refute the Commonwealth's novel and erroneous theory equating procedural default with lack of exhaustion. Part II.B, *infra*. Finally, Petitioner will show that many of his claims are exhausted by operation of law. Part II.C, *infra*. Further discussion of the Commonwealth's erroneous non-exhaustion defense will take place with respect to individual claims.

A. Legal Standards Governing Exhaustion.

As discussed in the *First Amended Petition*, the exhaustion requirement is satisfied when a petitioner "fairly present[s]" his claims in state court. Picard v. Connor, 404 U.S. 270, 275 (1971). This means that the claim in federal court must be the "substantial equivalent of that presented to the state courts." Evans v. Court of Common Pleas, 959 F.2d 1227, 1231 (3d Cir. 1992). The exhaustion requirement is satisfied when its purpose is fulfilled -- the state courts must simply be given "an opportunity to pass upon and correct alleged constitutional violations." Id. at 1230.

What is crucial for purposes of exhaustion is that the state court have the *opportunity* to consider the Petitioner's claim, regardless of the manner in which that opportunity arose. Thus, a claim will be deemed exhausted if: (1) the state court did not address the claim on the merits, but rather rejected it on a

procedural ground;[11] (2) the state court did not actually address a claim that was presented to it;[12] or (3) the state court addressed the claim, even though the petitioner did not specifically present it;[13] or (4) state law requires the court to address the claim even when not raised by the petitioner.[14] See generally 2 Liebman & Hertz, FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE § 23.3a, at 958-60 (4th ed. 2001) ("*FHCPP*").

Application of these legal principles makes it clear that all of Petitioner's claims are exhausted, as set forth in the *First Amended Petition*. Indeed, the Commonwealth repeatedly *admits* that Petitioner gave the state courts the opportunity to rule on his claims by raising them at trial, at post-verdict motions, on direct appeal, and in his PCRA petition and the appeal from the denial of the PCRA petition. See, e.g., *Response* at 45 (Pennsylvania Supreme Court refused to consider the issues that Petitioner raised on direct review); 46 (Petitioner "did in fact 'present' many claims to the PCRA court and on appeal to the Pennsylvania Supreme Court"); 47 (Petitioner "present[ed] many federal claims on the state level").

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[11] Bond v. Fulcomer, 864 F.2d 306, 309 (3d Cir. 1989) (claim exhausted although it was presented in untimely allocatur petition); accord Pursell v. Horn, 187 F. Supp. 2d 260, 289 (W.D. Pa. 2002).

[12] Smith v. Digmon, 434 U.S. 332, 333 (1978) (per curiam); Swanger v. Zimmerman, 750 F.2d 291, 295 (3d Cir. 1984).

[13] Walton v. Caspari, 916 F.2d 1352, 1356-57 (9th Cir. 1990).

[14] See Part II.C, *infra*.

Given these admissions, it is clear that Petitioner's claims are exhausted.

B. A State Court Procedural Default Ruling Does *Not* Result in a Finding that the Claim Was Not Fairly Presented.

The Commonwealth contends that when a state court finds a claim to be procedurally defaulted, that means the claim was not "fairly presented" for purposes of exhaustion: "[I]f a habeas applicant presents federal claims to a state court ... in a procedurally deficient manner, or under circumstances where dismissal without review of the merits is both proper and wholly predictable under state law, that is not 'fair presentation.'" *Response* at 41, citing Castille v. Peoples, 489 U.S. 346, 351 (1989); Coleman v. Thompson, 501 U.S. 722, 732 (1991).

The Commonwealth's argument confuses questions of exhaustion with questions of procedural default.[15] The Commonwealth's argument is plainly wrong and is based on a distortion of the holdings of Peoples and Coleman.

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[15] See Bronshtein v. Horn, 2001 WL 767553, *3 (E.D. Pa. July 5, 2001) (state court's rejection of fairly presented claims on procedural grounds raises questions of procedural default, not exhaustion); Carpenter v. Vaughn, 888 F. Supp. 635, 647 (M.D. Pa.1994)("When the petitioner fails to exhaust state remedies, the claims are never presented to the state court. When the petitioner procedurally defaults, the claims are presented to the state court in violation of state procedural rules, thereby precluding consideration of the merits of the claims.").

1. The Supreme Court's decision in Peoples is quite narrow and wholly inapplicable here. In Peoples, the petitioner had raised the relevant claims for the first and only time in an allocatur petition following denial of his direct appeal. Id. at 348. The Court noted that under Pennsylvania law, "such allocatur review 'is not a matter of right, but of sound judicial discretion, and an appeal will be allowed only when there are special and important reasons therefor.'" Id. at 347, quoting Pa. R.A.P. 1114. The petitioner contended that submitting a new claim on such discretionary review exhausted the claim. The Supreme Court rejected that argument, holding that raising a claim for the first time in an allocatur petition "does not ... constitute fair presentation." Id. at 351, citing Ex parte Hawk, 321 U.S. 114 (1944); Pitchess v. Davis, 421 U.S. 482 (1975) (per curiam).

Thus, the holding of Peoples is that a petitioner does not exhaust a claim by raising it *only* in a petition for discretionary review. That is made clear not only by the language of the opinion, but also by its citations to Hawk and Davis, which arose in similar circumstances. See Hawk, 321 U.S. at 116-17 (exhaustion not satisfied where petitioner filed rarely used original writ of habeas corpus in state appellate court, and failed to exhaust available trial court procedures); Davis, 421 U.S. at 488 (presentation of petitioner's claim in petition for extraordinary writ to appellate court did not exhaust claim). Peoples stands for the proposition that a petitioner cannot exhaust a claim by raising it solely in an extraordinary, discretionary review petition; it has nothing to do with whether the procedure used by the petitioner was improper as a matter of state law.

The Third Circuit confirmed this reading of Peoples in Hull v. Freeman, 932 F.2d 159 (3d Cir. 1991), overruled on other grounds, Caswell v. Ryan, 953 F.2d 853 (3d Cir. 1992). As noted in n.12, *supra*, in Bond v. Fulcomer the Third Circuit had ruled that a claim raised in the lower courts and presented in an untimely allocatur petition is exhausted, despite the failure to follow state procedural rules. Bond, 864 F.2d at 309.

In Hull, the Third Circuit followed Bond and reached the same result in a similar fact pattern. Hull, 932 F.2d at 164-65. It expressly found that Peoples did nothing to change that result:

> [Bond] does not contravene [Peoples]. There, the Supreme Court held that a claim has not been exhausted if it is raised for the *first* and *only* time in a petition to the state's highest court for discretionary review. Because Hull's ... claim was presented to both the Court of Common Pleas and the Superior Court prior to his untimely petition to the Pennsylvania Supreme Court, Bond, not Peoples, is controlling.

Hull, 932 F.2d at 165 n.6 (emphasis original).

Given Hull, the Commonwealth's contention that Peoples sweeps so broadly as to render every claim raised in a "procedurally deficient manner" not "fairly presented," *Response* at 41, is frivolous.

2. The Commonwealth quotes Coleman as follows:

> [A] habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance.

Response at 41, quoting Coleman, 501 U.S. at 732.

The Commonwealth contends that this passage supports its argument that a breach of state procedural rules amounts to a lack of fair presentation. Nothing could be further from the truth. The Commonwealth's quotation from Coleman is misleadingly edited and ripped out of context. In context, it provides no support for the Commonwealth's argument.

The issue before the Court in Coleman was not exhaustion, but procedural default. The petitioner had exhausted the relevant claims, but had violated state procedural rules in doing so, in that his appeal from the denial of state post-conviction relief was filed untimely.[16] Coleman, 501 U.S. at 727-28. The issue before the Court was whether the state court's dismissal of the petitioner's untimely appeal resulted in an enforceable procedural default in federal court.

Before addressing that issue, the Court discussed the fact that the doctrines of exhaustion and procedural default are both rooted in considerations of comity for state court judgments. Having discussed

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[16] There was no contention by any party, however, that the violation of state procedural rules acted in any way to negate the exhaustion of the petitioner's claims.

the comity basis of the exhaustion doctrine, id. at 731, it turned to discuss the comity basis for *procedural default*:

> These same [comity] concerns apply to federal claims that have been procedurally defaulted in state court. *Just as in those cases in which* a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance. A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer "available" to him.... In the absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases.

Id. at 731-32.

The context of this passage – and, in particular, the emphasized words that the Commonwealth edited out of its quotation – make clear that it was discussing procedural default, not exhaustion. Indeed, the Court actually stated that a petitioner "who has failed to meet the State's procedural requirements for presenting his federal claims" nevertheless "meets the technical requirements for exhaustion ...." Id.

Coleman does not support the Commonwealth's argument; it refutes the argument. The Commonwealth's suggestion to the contrary is disingenuous and misleading.

C. All *Record-Based* Claims Were Automatically Exhausted on Direct Appeal.

As stated in the *First Amended Petition* at 4-9, in Pennsylvania capital cases, record-based claims of constitutional error are automatically exhausted on direct appeal because: (1) on direct appeal in a capital case, the Pennsylvania Supreme Court is required to review the entire record to determine if the death sentence was imposed as a result of "passion, prejudice or any other arbitrary factor"; (2) under this requirement, the Pennsylvania Supreme Court reviews the *entire record* for *constitutional error* and *sua sponte* addresses constitutional issues it believes are present, even if they are not raised by the defendant; and (3) this automatic, mandatory review satisfies the exhaustion requirement for all record-based claims of constitutional error.

The Commonwealth asserts that there is no such automatic exhaustion of record-based claims on direct appeal. See *Response* at 47-59. The Commonwealth is wrong. Automatic exhaustion of record-based claims on direct appeal follows inevitably from the nature of the Pennsylvania Supreme Court's mandatory direct appellate review in capital cases and the purposes of the exhaustion requirement. See *First Amended Petition* at 4-9. A state is not required to adopt a system of mandatory appellate review like Pennsylvania's. Having chosen such a system,

however, Pennsylvania is bound by the effects that flow from it for purposes of federal habeas review, and those effects include the automatic exhaustion of record-based constitutional claims.

Moreover, while attacking Petitioner's argument, the Commonwealth actually admits that claims which fit into the category of issues delineated by 42 Pa. C.S. § 9711(h)(3) are automatically reviewed on direct appeal. *Response* at 52-53. The Commonwealth cannot dispute that: (1) the Pennsylvania Supreme Court on direct appeal is required in every capital case to review the entire record; and (2) this mandatory review is for "passion, prejudice or any other arbitrary factor," § 9711(h)(3). Instead, the Commonwealth asserts that this passion/prejudice/arbitrary factor review does not encompass review for constitutional claims. Divorced from its sound and fury, then, the Commonwealth's argument boils down to its disagreement with Petitioner about *what types of claims* fit into this category – *i.e.*, the Commonwealth asserts that Petitioner has misrepresented the class of claims that are automatically reviewed by the Pennsylvania Supreme Court.

The scope of the Pennsylvania Supreme Court's passion/prejudice/arbitrary factor review, of course, is "a question of state law." Nave v. Delo, 62 F.3d 1024, 1039 (8th Cir. 1995) (where statute requires state court to review for "passion, prejudice, or any other factor," the "scope of the state court's mandatory review is, ultimately, a question of state law"). Accordingly, to determine the scope of that review, this Court must look to the Pennsylvania Supreme Court's decisions.

The Pennsylvania Supreme Court has provide ample guidance on this issue. See, e.g., *First Amende Petition* at 5 n.6 & 5-6 n.7 (citing cases). It ha explicitly stated that its review of the entire record i "for constitutional compliance," Commonwealth v Breakiron, 571 A.2d 1035, 1046 (Pa. 1990) (Nix, C.J. with Zappala, J., dissenting); for "all possible bases fo overturning the conviction or the death sentence,' Commonwealth v. Appel, 539 A.2d 780, 784 (Pa. 1988) and to determine if the defendant received "a full and fair trial that afforded him all available procedural and substantive rights," Commonwealth v. Whitney, 512 A.2d 1152, 1163 (Pa. 1986), encompassing "errors in addition to those alleged by appellant," Commonwealth v. Beasley, 475 A.2d 730, 742 n.1 (Pa. 1984). In particular, the Pennsylvania Supreme Court has explicitly noted that the claims included in this mandatory appellate review include unconstitutional jury instructions, Commonwealth v. Billa, 555 A.2d 835, 845 (Pa. 1989); prosecutorial misconduct, Commonwealth v. Brown, 711 A.2d 444, 456 (Pa. 1998); Whitney, 512 A.2d at 1164-65 (Papadakos, J., concurring); ineffective assistance of counsel, Commonwealth v. Williams, 615 A.2d 716, 729-30 (Pa. 1992) (Nix, C.J., dissenting); Commonwealth v. Stoyko, 475 A.2d 714, 721 (Pa. 1984); id., 475 A.2d at 725-26 (Hutchinson, J., dissenting); competency, Appel, 539 A.2d at 783; and voluntariness and intelligence of waivers, id., 539 A.2d at 783. In short, the Pennsylvania Supreme Court has repeatedly acknowledged that it was obligated to independently and *sua sponte* review the *entire record* of capital direct appeals for constitutional error, whether or not these claims of constitutional error had been explicitly presented to the Court.

None of the Commonwealth's attacks on this method of exhaustion carry any weight. The Commonwealth criticizes at length Petitioner's discussion of Beam v. Paskett, 3 F.3d 1301 (9th Cir. 1993), asserting that the relevant part of Beam is "dicta" and that Beam is a much narrower decision than Petitioner suggests. *Response* at 51-2.

The Commonwealth fails to acknowledge, however, that Hoffman v. Arave, 236 F.3d 523 (9th Cir. 2001), follows Beam and holds that all sentencing error claims are exhausted by Idaho's mandatory direct appellate review, which is materially identical to that performed by the Pennsylvania Supreme Court. The petitioner in Hoffman presented claims to the habeas court that he had never explicitly presented to the state courts, and the habeas court held that those claims *were automatically exhausted on direct appeal by virtue of the state supreme court's mandatory appellate review*:

> Hoffman challenges the trial court's denial of his request to have counsel present during the presentence interview with the probation officer as a violation of his Fifth, Sixth, and Fourteenth Amendment rights. ... Although *petitioner failed to raise this claim in his consolidated appeal to the Idaho Supreme Court*, the Idaho death penalty statute requires mandatory review of the entire record for sentencing errors. See Beam .... *All sentencing errors are treated as implicitly raised, removing the bar of procedural default*. See Beam, 3 F.3d at 1306-07. The federal district court thus appropriately reached the merits of Hoffman's [constitutional] claims.

Hoffman, 236 F.3d at 536.

Hoffman then *granted habeas relief* on the claim that had never been explicitly presented to the state courts but had been "implicitly raised" and exhausted by virtue of the state's mandatory appellate review process. Hoffman thus confirms that Pennsylvania's mandatory appellate review exhausted Petitioner's record-based claims.

As in Idaho, Pennsylvania has established a mandatory capital review system in which the state supreme court is required to examine the record on its own initiative in order to determine whether the conviction and sentence are free from "passion, prejudice or other arbitrary factor." As described above, this review occurs even if the defendant himself raises no claims of such errors. Pursuant to 42 Pa. C.S. § 9711(h)(3), reinforced by the Pennsylvania Supreme Court's capital case no-waiver rule,[17] the Pennsylvania Supreme Court considers federal constitutional issues under this system of automatic review, whether or not such claims of error were specifically raised on appeal or directly objected to by defense counsel at trial. Because the Pennsylvania Supreme Court had statutory notice of the types of errors for which it was required to examine the record, and in fact stated that it conducted this review, this Court must presume that the Pennsylvania Supreme Court carried out its statutory obligations.

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[17] The no-waiver rule was in full effect at the time of Petitioner's trial and direct appeal, and remained in effect at least through completion of direct appeal. Commonwealth v. Albrecht, 720 A.2d 693, 700 (Pa. 1998).

Consequently, the state court's affirmance of Petitioner's sentence after mandatory review constituted a rejection of claims of error that fell within the Court's obligatory review, even if Petitioner had not raised those claims with specificity on direct review.

The Commonwealth also asserts that record-based claims cannot automatically be exhausted on direct appeal because, if they were, the Pennsylvania Supreme Court would deem such claims "previously litigated" when raised in PCRA proceedings. See *Response* at 54. The Commonwealth is wrong. A state is free as a matter of state law to establish its own scheme of post-conviction review and to determine what claims may or may not be presented in those proceedings. Whatever scheme it chooses does not affect the federal law standard for exhaustion. Whether or not state post-conviction law deems it previously litigated, a claim already decided by the state's highest court on direct appeal by operation of law is still a claim already decided and – for habeas purposes – a claim already exhausted.[18]

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[18] Moreover, the Pennsylvania Supreme Court *has* deemed record-based claims previously litigated by virtue of its mandatory direct appellate review in capital cases. In Commonwealth v. Michael, 674 A.2d 1044 (Pa. 1996), on direct appeal, the defendant *raised no claims* and, instead, *asked that his conviction and death sentence be affirmed*. Because no claims were raised, the Pennsylvania Supreme Court's review was solely for "passion, prejudice or any other arbitrary factor." Id. at 1047-48. The Court affirmed the conviction and sentence.

In subsequent PCRA proceedings, the defendant challenged the voluntariness of his guilty plea. Commonwealth v. Michael, 755 A.2d 1274, 1278 (Pa. 2000). The Pennsylvania Supreme Court

The Commonwealth cites decisions from other Courts of Appeal, relating to the appellate review systems of other states, which the Commonwealth asserts have rejected similar theories of exhaustion. See *Response* at 54-55. These cases do not help the Commonwealth.

1. Nave v. Delo, 62 F.3d 1024 (8th Cir. 1995), emphasizes that the meaning of the words "passion, prejudice, or any other arbitrary factor" is "a question of state law." Id. at 1039. Nave rejected the petitioner's argument because, as a matter of Missouri law, "passion, prejudice, or any other arbitrary factor" did not encompass "constitutional or instructional errors that are not specified in the direct appeal." Id. Pennsylvania law is different from Missouri law. Under Pennsylvania law, passion/prejudice/arbitrary factor review *does* encompass record-based claims of constitutional error, as described above and in the *First Amended Petition*. Thus, while the Pennsylvania and Missouri statutes use the same words, the meaning afforded those words under state law is very different. Nave does not support the Commonwealth's argument.[19]

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referred to its statutorily-mandated review of the record on direct appeal, and held that its direct appellate review rendered any challenge to the plea "*previously litigated*" under the PCRA. Id. at 1278-79. Thus, the Michael Court did exactly what the Commonwealth claims is not done.

[19] The Commonwealth's reliance on Martinez-Villareal v. Lewis, 80 F.3d 1301, 1306 (9th Cir. 1996), and United States ex rel. Collins v. Welborn, 868 F.Supp. 950, 964-65 (N.D. Ill. 1994), vacated sub nom. Bracy v. Gramley, 520 U.S. 899 (1997) is similarly misplaced. See *Response* at 55. Martinez-Villareal simply found and relied on the fact that under Arizona law,

2. Julius v. Johnson, 840 F.2d 1533, 1546 (11th Cir. 1988), see *Response* at 55, rejected a habeas petitioner's argument that all trial errors were exhausted by the Alabama state court's "plain error" review. "Plain error," as defined in Alabama, does *not* involve review for constitutional error, which the Pennsylvania Supreme Court has expressly held to be part and parcel of its direct appellate review in capital cases. Instead, the Alabama courts will find "plain error" only "sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." Ex parte Woodall, 730 So.2d 652, 657 (Ala. 1998). Thus, Alabama plain error review is completely distinct from Pennsylvania passion/prejudice/arbitrary factor review.

3. Kornahrens v. Evatt, 66 F.3d 1350 (4th Cir. 1995), offers little support for the Commonwealth. In Kornahrens, a divided panel of the Fourth Circuit rejected a habeas petitioner's argument that the South Carolina Supreme Court's practice of *in favorem vitae* (in favor of life) review automatically exhausted record-based claims. The majority rejected the petitioner's argument, relying heavily on the fear expressed in Julius, supra, that adopting the petitioner's argument would decrease the number of procedural defaults. Kornahrens, 66 F.3d at 1362-63. The Kornahrens majority, however, also provided merits review to all claims, id. at 1363, and Judge

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Arizona fundamental error review did not prevent a subsequent procedural default. Welborn applied Nave to an Illinois habeas case in which, under Illinois law, the Illinois Supreme Court was not required to automatically review any claims on direct appeal.

Motz dissented from the majority's procedural default analysis altogether.

Moreover, the Fourth Circuit has never decided whether claims could automatically be exhausted on direct appeal under a scheme like Pennsylvania's that requires the state supreme court to review certain classes of claims; instead, the court has only stated in dictum that such a holding would be counter to the "spirit" of Kornahrens. Matthews v. Evatt, 105 F.3d 907, 914 (4th Cir. 1997). Thus, in the end, the Commonwealth relies on the "spirit" of a divided panel opinion, from which one Judge dissented, while the majority felt obliged to render an alternative holding.[20]

At least two Pennsylvania district courts have agreed that Pennsylvania's mandatory direct appellate review exhausts some or all record-based constitutional claims. See Bronshtein v. Horn, 2001 WL 767593, *10 n.19 (E.D. Pa. July 5, 2001) (Reed, J.) ("Even when a petitioner fails to raise a particular constitutional issue, the mandatory review of capital convictions and sentencings required in Pennsylvania is sufficient to exhaust fundamental constitutional claims"); Laird v. Horn, 159 F. Supp. 2d 58, 71-73 (E.D. Pa. 2001) (Dubois, J.) (mandatory review

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[20] Neither Mu'Min v. Pruett, 125 F.3d 192, 196-97 (4th Cir. 1997); Smith v. Moore, 137 F.3d 808, 821 (4th Cir. 1998); nor Arnold v. Evatt, 113 F.3d 1352, 1357 (4th Cir. 1997), adds anything to this analysis. Mu'Min relies on the limited nature of Virginia's mandatory review, which "simply does not require the court to examine the record for constitutional errors not specified on appeal," Mu'min, 125 F.3d at 197, unlike Pennsylvania law, as discussed above. Smith and Arnold simply rely on Kornahrens and Matthews.

exhausts all claims that relate to passion, prejudice or arbitrariness of the verdict or sentence).

Thus, trial-record based claims were exhausted on direct appeal to the Pennsylvania Supreme Court, because they were necessarily considered and rejected as part of the Pennsylvania Supreme Court's mandatory review. Moreover, any issues actually discussed and decided by the state supreme court -- in addition to its mandatory appellate review -- are also exhausted. Walton v. Caspari, 916 F.2d 1352, 1356-57 (8th Cir. 1990). When all these factors are taken into account, Respondents' contentions regarding exhaustion are unavailing, as will be described below with respect to individual claims. See Part IV, infra.

III. THERE IS NO "ADEQUATE" PROCEDURAL BAR TO REVIEW OF THE MERITS OF PETITIONER'S CLAIMS.

The Commonwealth contends at great length that review of the merits of all of Petitioner's claims is barred by the state courts' application of procedural default rules. In the Commonwealth's view, state court application of a procedural default rule bars review of the merits in federal habeas proceedings as long as application of the rule was any more predictable than a bolt of lightning.[21]

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[21] This theory is repeated over and over. See, e.g., *Response* at 62-63; 77 ("*was Pennsylvania's ... rule ... so utterly confusing and so erratically applied that petitioner ... had no fair notice*" of the rule) (emphasis original); 84 (state rule adequate unless it was an unforeseeable and "novel procedural 'trap' or 'surprise'").

Endless repetition and even italicization of an assertion, however, does not make it more accurate. In fact, well-established law from the United States Supreme Court and the Third Circuit requires this Court to undertake an inquiry quite different from that proposed by the Commonwealth. According to these controlling decisions, discussed in Part A below, this Court must determine whether the state default rule was "adequate" to bar federal habeas review of the merits. Adequacy analysis requires this Court to determine: a) what rule or rules were actually applied by the state courts;[22] b) when did the petitioner allegedly violate the rule;[23] c) whether the petitioner actually violated[24] a rule that spoke in clear and unmistakable terms;[25] and d) whether the rule was

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[22] See *FHCPP* §§ 26.1, 26.2e.

[23] E.g., Doctor v. Walters, 96 F.3d 675, 678, 684-86 (3d Cir. 1996) (state rule, that petitioner waived direct appeal claims by escaping from prison during 1986 trial, not adequate because not firmly established *at the time of the escape*; relevant date for determining "whether the rule was firmly established and regularly applied, [was] *not* in *1993* when the Superior Court relied upon it [to bar the claims], but rather as of the date of the waiver that allegedly occurred when Doctor escaped in *1986*").

[24] See *FHCPP* §§ 26.1, 26.2c.

[25] See Ulster County Ct. v. Allen, 442 U.S. 140, 150-51 & nn.8-9 (1979) (no default where New York had no clearly applicable contemporaneous-objection rule); Cabrera v. Barbo, 175 F.3d 307, 313 (3d Cir. 1999) ("an adequate procedural ground is predicated on procedural rules that speak in unmistakable terms"); *FHCPP*, § 26.2c.

"firmly established and consistently applied" at the time that petitioner allegedly violated the rule:[26]

> [A] state procedural rule will not bar federal review of a habeas claim unless that rule was firmly established and regularly followed at the time the default occurred. See Ford v. Georgia, 498 U.S. 411, 424 (1991) ...; Doctor v. Walters, 96 F.3d 675, 684 (3d Cir. 1996) ("A state rule is adequate only if it is 'consistently and regularly applied.'" (quoting Johnson v. Mississippi, 486 U.S. 578, 587 (1988))). As such, in determining whether a particular state rule is independent and adequate, the Court must identify the state procedural rule, ascertain the time at which the alleged default occurred and then decide whether the rule was firmly established and regularly and consistently applied at the time the alleged default occurred.

Laird, 159 F. Supp.2d at 73-74 (some citations omitted).[27]

Having set forth the correct analytical framework in Part A below, Petitioner will then proceed to show in Part B below that in numerous respects the rules applied by the state courts in denying relief were neither "clear and unmistakable" nor "firmly established and consistently applied" at the time of the

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[26] E.g., Ford v. Georgia, 498 U.S. 411, 423-24 (1991).

[27] Accord Jermyn v. Horn, 266 F.3d 257, 278-79 (3d Cir. 2001); Banks v. Horn, 126 F.3d 206, 211 (3d Cir. 1997) (Banks-1); Jacobs v. Horn, 129 F.Supp.2d 390, 397-98 (M.D. Pa. 2001); Peterkin, 176 F. Supp.2d at 353-55; Bronshtein, 2001 WL 767593 at *4-*5.

alleged defaults. Because the rules applied by the state courts do not meet the requirements for an "adequate" procedural rule, there is no bar to federal habeas review of the merits of Petitioner's claims.

A. Procedural Default Law: The Components of Adequacy Analysis.

1. What rule or rules were actually applied by the state courts?

A federal court will not enforce a state procedural default rule that was not actually relied on by the state court. If the state court was silent about some potentially applicable state default rule, or if it ruled on the merits, the state rule has no effect on federal court review of a federal habeas petition. Allen, 442 U.S. at 154 (no procedural default where state courts fail to "indicate that a federal constitutional claim is barred by some state procedural rule"); Jackson v. Shanks, 143 F.3d 1313, 1319 (10th Cir. 1998) ("We are not inclined to rely on a state procedural rule that the [state] courts did not rely upon."). Therefore, "if the state court under state law chooses not to rely on a procedural bar ..., then there is no basis for a federal habeas court's refusing to consider the merits of the federal claim." Harris v. Reed, 489 U.S. 255, 265 n.12 (1989).

Under Harris, then, the federal habeas court's focus is on whatever rule(s) the state courts actually relied on, not on "theoretically applicable" rules that the state courts might have relied on, but did not. Smith v. Freeman, 892 F.2d 332, 337 (3d Cir. 1989) ("we are not bound to enforce a state procedural rule when the

state itself has not done so, even if the procedural rule is theoretically applicable to our facts").

2. When did the petitioner allegedly violate the rule?

As part of its adequacy analysis, the federal habeas court must determine when the petitioner allegedly violated the state rule. That is the time at which – in order for the state rule to be adequate – the rule must have been clear and unmistakable, firmly established, and regularly applied. As the Third Circuit explained in Cabrera, "these conditions [-- the existence of a firmly established and regularly applied rule –] must have *existed at the time of the state court procedural default*." Cabrera, 175 F.3d at 313.

The "time of the state court procedural default" is the time when the petitioner committed the supposed procedural miscue that results in an eventual state court bar of his claims, *not* the (usually later) date when the state courts actually hold the claims to be barred.[28]

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[28] E.g., Ford, 498 U.S. at 423-24 (contemporaneous objection rule not adequate because not firmly established and regularly followed at time, prior to trial, when defendant waived claim by failing to object); Terrell v. Morris, 493 U.S. 1, 2 (1989) (state rule requiring certain claims be raised on direct appeal not adequate because not firmly established and regularly followed at time of direct appeal; petitioner "could not have known that he would default his ... claim" because default rule postdated time of purported default); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-58 (1958) (distinction between state writs of certiorari and mandamus, used by state court to bar claim, not adequate because not clear and firmly established at time NAACP sought state court review); Doctor, supra n. 23); Reynolds v. Ellingsworth,

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843 F.2d 712, 722 (3d Cir. 1988) (state court bar on post-conviction claim, because not preserved by objection at trial, not adequate because contemporaneous objection requirement not clearly and firmly established at time of trial); James v. Gibson, 211 F.3d 543, 550-51 (10th Cir. 2000) (where federal habeas petition presented claim that had not been presented to state courts on direct appeal or in first state post-conviction proceedings, exhaustion was futile because presentation of claim in second state post-conviction proceedings was barred by 1995 amendments to state post-conviction statute; bar rule not adequate because "Mr. James filed his direct appeal and [first] application for post-conviction relief in the state courts in the 1980s. Therefore, his purported default occurred well before the 1995 amendments."); Rogers v. Gibson, 173 F.3d 1278, 1290 & n.12 (10th Cir. 1999) ("We determine whether a procedural rule was firmly established and regularly followed by looking to the time of the asserted procedural default."); Walker v. Attorney General, 167 F.3d 1339, 1344-45 (10th Cir. 1999) ("A defendant cannot be expected to comply with a procedural rule that does not exist at the time, and should not be deprived of a claim for failing to comply with a rule that only comes into being after the time for compliance has passed."); Rogers v. Howes, 144 F.3d 990, 992-95 & n.5 (6th Cir. 1998) (where state post-conviction court barred claims because defendant never filed direct appeal, "the question is not whether the state courts consistently apply the procedural bar in the present [1998], but whether they did so at the time of petitioner's conviction [1963]"); Fields v. Calderon, 125 F.3d 757, 760-61 (9th Cir. 1997) ("[T]he proper time for determining whether a procedural rule was firmly established is the time of [the] purported procedural default. Therefore, we examine whether the state courts were regularly and consistently applying the relevant procedural default rule at the time the claim should have been raised."); Calderon v. United States District Court (Hayes), 103 F.3d 72, 74-75 (9th Cir. 1996) (where state court barred claims raised in second post-conviction petition because they were not raised in first post-conviction petition, "the critical time to judge" adequacy of bar rule is when petitioner filed first petition "and failed to raise all of his claims"; no default where bar rule was not adequate at time of first petition even if it was so at time of second

For example, state court rules barring claims because they were not raised at (1) trial; or (2) on direct appeal; or (3) in a state post-conviction petition; or (4) within a certain time, are not adequate unless they were unmistakable, firmly established and regularly followed at, respectively, (1) the time of trial;[29] (2) the time of direct appeal;[30] (3) the time the

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petition); see also *New Bars* at 74-85 (discussing some of these decisions).

[29] E.g., Ford v. Georgia; Anderson v. Calderon; Reynolds v. Ellingsworth; Spencer v. Kemp, 781 F.2d 1458, 1467-71 (11th Cir. 1986) (en banc).

[30] E.g., Terrell v. Morris; Reynolds v. Ellingsworth; James v. Gibson; Combs v. Coyle; Rogers v. Gibson; Walker v. Attorney General; Rogers v. Howes; Fields v. Calderon; Calderon v. Hayes; Braun v. Powell, 227 F.3d 908, 912-14 (7th Cir. 2000); Barnett v. Hargett, 174 F.3d 1128, 1134-35 (10th Cir. 1999); Moore v. Parke, 148 F.3d 705, 709-10 (7th Cir. 1998) ("when a rule changes the standard for collateral review based on the failure to raise a claim on direct appeal, the default occurs at the time of the direct appeal"); Liegakos v. Cooke , 106 F.3d 1381, 1384-85 (7th Cir. 1997); Forgy v. Norris, 64 F.3d 399, 401-02 (8th Cir. 1995); Cochran v. Herring, 43 F.3d 1404, 1408-09 (11th Cir. 1995); Warner v. United States, 975 F.2d 1207, 1213-14 (6th Cir. 1992), Johnson v. Muncy, 830 F.2d 508, 510-14 (4th Cir. 1987); Wheat v. Thigpen, 793 F.2d 621, 624-26 (11th Cir. 1986) (considering, inter alia, that "the practice of the Mississippi Supreme Court indicates that in death penalty cases the court does not consistently follow the narrow scope of review outlined in some of its opinions").

state post-conviction petition was filed;[31] and (4) the date at which the claims became time-barred.[32]

3. Did the petitioner actually violate a rule that speaks in clear and unmistakable terms?

In order for an asserted default to be respected in federal court, state law must clearly support the existence of the alleged procedural requirement. Ulster County Ct. v. Allen, 442 U.S. 140, 150-51 & nn.8-9 (1979) (no default where New York had no clearly applicable contemporaneous-objection rule); Cabrera, 175 F.3d at 313 ("an adequate procedural ground is predicated on procedural rules that speak in unmistakable terms"); *FHCPP*, § 26.2c. Similarly, where the case falls within a recognized exception to the state procedural rule that the petitioner is alleged

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[31] E.g., James v. Gibson; Walker v. Attorney General; Calderon v. Hayes.

[32] E.g., Calderon v. Hayes; Jackson v. Calderon, 211 F.3d 1148, 1154 (9th Cir. 2000) (time-bar on post-conviction petition not adequate because "[a]ny undue delay on the part of [petitioner] occurred before [the opinion in which the state supreme court clarified its time-bar rules]"); White v. Bowersox, 206 F.3d 776, 778-82 (8th Cir. 2000) (time-bar on state post-conviction petition not adequate because not clear at time petitioner missed filing deadline); Calderon v. United States District Court (Bean), 96 F.3d 1126, 1130-31 (9th Cir. 1996) (same); Morales v. Calderon, 85 F.3d at 1390-91(same); Easter v. Endell, 37 F.3d 1343, 1344-47 (8th Cir. 1994) (same); Bronshtein v. Horn, 2001 WL 767593, *4-*10 (E.D. Pa. July 5, 2001) (Reed, J.) (Pennsylvania's time bar not adequate because not clear at time petitioner missed deadline); Pursell v. Horn, 187 F. Supp. 2d 260, 290-97 (W.D. Pa. 2002) (same).

to have violated, there is no cognizable default. Allen, 442 U.S. at 150-51 & nn.8, 10 (state law exception for claims of innocence and constitutional error); *FHCPP*, § 26.2c.

Moreover, where the petitioner actually or substantially complies with the state law rule, there is no federally cognizable procedural default. Lee v. Kemna, 122 S. Ct. 877, 889-90 (2002) (even though petitioner violated state rule by failing to file written motion, he "*substantially complied* with Missouri's key Rule"); James v. Kentucky, 466 U.S. 341, 351 (1984) ("Where it is inescapable that the defendant sought to invoke the substance of his federal right, the asserted state-law defect in form must be more evident than it is here.").

4. Was the rule "firmly established and consistently applied" at the time that petitioner allegedly violated the rule?

The "state bears the burden of proving the adequacy of a state procedural bar.[33] A rule cannot be "adequate" under the procedural default doctrine unless it is "firmly established and regularly followed" at the time the purported default took place. Ford v. Georgia, 498 U.S. 411, 423-24 (1991). Accord James v. Kentucky, 466 U.S. 341, 348 (1984) (rule must be "clear," "firmly established and regularly followed").

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[33] Hooks v. Ward, 184 F.3d 1206, 1216-17 (10th Cir. 1999); accord Trest v. Cain, 522 U.S. 87, 89 (1997) (procedural default is an affirmative defense that the state must establish); *FHCPP* § 26.2d.

The Third Circuit has summarized the adequacy requirement as follows:

> [A]n adequate procedural ground is predicated on procedural rules that *speak in unmistakable terms*.... [T]he procedural disposition must comport with similar decisions in other cases so there is a *firmly established* rule that is *applied in a consistent and regular manner in the vast majority of the cases.* Of course, these conditions must have *existed at the time of the state court procedural default.*

Cabrera v. Barbo, 175 F.3d 307, 313 (3d Cir. 1999).

B. The State Court Rulings.

At the outset, it is unclear whether any "rule" was applied in Commonwealth v. Kindler, 639 A.2d 1 (Pa. 1994) (Kindler-1). In Kindler-1, the Court reviewed the trial court's dismissal of Petitioner's post-verdict motions on the grounds that he was a fugitive, and denial of his request to reinstate those motions after he had been apprehended.

The Court agreed only on the final result, not on any controlling rule. Three Justices of the Court joined the Opinion Announcing the Judgment of the Court: Chief Justice Nix, Justice Papadakos, and Justice Montemuro. Three Justices concurred, while Justice Larsen did not participate in the decision. Id. at 8. Under Pennsylvania law, the plurality opinion of the Court "lacks precedential value," Hoy v. Angelone, 720 A.2d 745, 750 (Pa. 1998); its "legal conclusions and/or reasoning ... do not constitute binding authority," Interest of O.A., 717 A.2d 490, 496 n.4 (Pa.

1998); and the opinion "was not decisional." Commonwealth v. Davenport, 342 A.2d 67, 75 n.3 (Pa. 1975).[34] As such, Kindler-1 stands only for a result, and did not apply *any* specific rule.

The Opinion Announcing the Judgment made the following statements:

1. The Opinion asserted that there was a "general rule," which it stated was "applicable to capital cases," that "defendants who are fugitives from justice during the appellate process have *no right to any appellate review,* even though they have been recaptured and returned to the custody of Pennsylvania." Kindler-1 639 A.2d at 3, citing Commonwealth v. Passaro, 476 A.2d 346 (Pa. 1984).

2. The Opinion stated, however, that this "general rule" *did not* apply to Petitioner, because his "fugitive status did not take place during the pendency of an appeal before us," but rather "while the trial court was considering [his] post-verdict motions ...." Kindler 1, 639 A.2d at 3.[35]

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[34] Because the plurality opinion did not command a majority, there was no "holding" of the Court, despite the Commonwealth's assertion to the contrary. See, e.g., *Response* at 85 (referring to the Court's "holding").

[35] The Opinion's insistence on distinguishing defendants who become fugitives "during the appellate process" from those who become fugitives during the pendency of trial proceedings makes clear that the Commonwealth is in error when it asserts that the trial court was sitting as an appellate tribunal. See, e.g., *Response* at 70, 75. The Commonwealth cites no authority for this assertion, and Kindler-1 makes clear that it is inaccurate with respect to the issues before this Court.

3. In the absence of an applicable "general rule," the plurality was required to fashion a rule for situations like Petitioner's. After considering Ortega-Rodriguez v. United States, 507 U.S. 234 (1993); Molinaro v. New Jersey, 396 U.S. 365 (1970); and Passaro, the plurality stated that the following rule should apply:

> [T]rial courts, when faced with a defendant in fugitive status, ... have every right to fashion an appropriate response which can include the dismissal of pending post-verdict motions. Our review of that action is limited to determining whether the flight has a connection with the court's ability to dispose the defendant's case and whether the sanction imposed in response to the flight is reasonable under the circumstances.

Kindler-1, 639 A.2d at 3.

4. Applying this newly fashioned rule, the plurality found that Petitioner's flight had a "connection to the trial court process," and that the trial court's dismissal of and refusal to reinstate the post-verdict motions were reasonable. Id. Accordingly, the plurality stated, Petitioner's appeal

> comes to us without any allegations of error (direct or collateral) preserved, much like those cases where an Appellant either chooses not to raise any issues related to the trial and sentencing hearing or as in those cases where the Appellant is a fugitive during the appellate process.

Id. at 4 (footnote omitted), citing Commonwealth v. Judge, 609 A.2d 785 (Pa. 1992).

5. Three concurring Justices construed the plurality as having adopted the forfeiture-of-appellate-review rationale of Passaro. Kindler-1, 639 A.2d at 8-9 (Cappy, J., concurring); id. at 9 (Flaherty, J., concurring). The concurring Justices believed that Passaro did not apply to Petitioner, id. at 8, but agreed that the "*trial court* possessed full authority to dismiss [Petitioner's] post-verdict motions by virtue of [his] escape and absence while those motions were pending." Id.

6. The concurring Justices would have allowed Petitioner to reinstate his post-verdict motions on a showing of a sufficiently "compelling reason for having his post-verdict motions heard." Id. They apparently concluded that Petitioner had not made such a showing. Id.

Beginning in 1996, Petitioner sought PCRA review. The PCRA court dismissed and he appealed to the Pennsylvania Supreme Court, asserting that there was no connection between his escape status at the time of the post-verdict motions and the PCRA court's ability to review the merits of his claims. The Pennsylvania Supreme Court rejected his appeal on the following grounds:

7. Petitioner's claim regarding the dismissal of the PCRA petition was "previously litigated" on his direct appeal in Kindler-1. Commonwealth v. Kindler, 722 A.2d 143, 147 (1999) (Kindler-2). Because the claim was "previously litigated," Petitioner could not obtain relief under the PCRA. Id., citing Commonwealth v.

Crawley, 663 A.2d 676, 678 (1995); 42 Pa. C.S. § 9544(a)(2).

8. The Court asserted that in Kindler-1 – contrary to the language quoted above – it had relied on the forfeiture-of-appellate-rights rule of Passaro. Kindler-2, 722 A.2d at 147.

9. The Court ruled that to give Petitioner the opportunity to challenge his conviction and death sentence in PCRA proceedings would "render meaningless all prior rulings of the trial court and this Court." Id. at 148. As a result, Petitioner's escape while post-verdict motions were pending precluded any review of his PCRA petition.

10. Finally, the Court stated that Petitioner was not entitled to rely on the "relaxed waiver" rule that generally applied to capital cases:

> [Petitioner] also argues that, because this is a capital case, he should be given the benefit of the "relaxed waiver" rule .... This doctrine permits the review of claims in capital cases even if there has been a procedural default in the history of the case. What [Petitioner] misapprehends however, is that it was not a procedural default that precluded review of his claims, but rather his own act of becoming a fugitive that resulted in the *forfeiture* of the right to review of those claims.

Kindler-2, 722 A.2d at 148 n.13.

C. The Date of the Alleged Violation.

Petitioner allegedly violated the fugitive waiver rule when he escaped from custody on September 19, 1984. See generally NT 10/23/84. That date is the applicable one for purposes of determining whether the default was "adequate" to bar federal habeas review. Doctor, 96 F.3d at 685-86.

D. The Procedural Default Rules Applied by the State Courts Were Not Adequate to Bar Federal Habeas Merits Review in 1984.

1. As of 1984, the rule that a fugitive who was recaptured prior to the initiation of the appellate process had no right to appellate review was not firmly established.

As discussed above, Passaro held that a defendant who is a fugitive during the appellate process has "no right to any appellate review." Passaro, 476 A.2d at 349. The application of that rule ("the Passaro rule") to an appellant situated like Petitioner was not "firmly established" as of September 1984. As discussed above, see part B, supra, it does not appear that the plurality applied that rule to Petitioner in Kindler-1, although the Court stated in Kindler-2 that it had done so. Assuming *arguendo* that the Passaro rule was applied to Petitioner, its application was not "firmly established" as of 1984, as the Third Circuit held in Doctor v. Walters, 96 F.3d 675, 685-86 (3d Cir. 1996) (Passaro not firmly established as of 1986).

As of 1984, the leading Pennsylvania cases regarding the fugitive waiver rule were

Commonwealth v. Galloway, 333 A.2d 741 (Pa. 1975), and Commonwealth v. Passaro, 476 A.2d 346 (Pa. 1984). Review of these cases demonstrates that there was no firmly established rule in 1984 that a fugitive had forfeited his right to appellate review if he was recaptured prior to his appeal. Doctor, supra.

In Galloway, the defendant had escaped while his post-verdict motions were pending. The trial court dismissed the motions with prejudice. After Mr. Galloway was apprehended, his supplemental post-verdict motions were dismissed. Mr. Galloway escaped again while his appeal was pending, and the Commonwealth moved to dismiss the appeal. Mr. Galloway was again returned to custody, and the Court considered both the merits of the appeal and the Commonwealth's motion to dismiss. Galloway, 333 A.2d at 742.

The Court noted that an appellate court will dismiss the appeal of a defendant who is a fugitive from justice because such a person "by escaping, has placed himself beyond the jurisdiction and control of the court, and, hence, might not be responsive to the judgment of the court." Id. The Court determined, however, that this rule did not apply to Mr. Galloway, because he had been returned to custody:

> Since Galloway is no longer a fugitive from justice and is now subject to the jurisdiction of this Court, he will be responsive to any judgment this Court renders. Therefore, this Court has no basis upon which to grant a motion to dismiss the appeal at this juncture. Hence, the Commonwealth's motion to dismiss the appeal will be denied.

Id. The Court then remanded to the trial court to consider Mr. Galloway's post-verdict motions. Id.

In Passaro, the defendant escaped while his appeal was pending. The Superior Court granted the Commonwealth's motion to dismiss the appeal, and denied the defendant's motion to reinstate the appeal after he was apprehended. The defendant then appealed to the Pennsylvania Supreme Court. Passaro, 476 A.2d at 347-48.

The Court first ruled that the Superior Court acted properly in dismissing the appeal when the defendant was a fugitive, citing *inter alia* and quoting Galloway. Passaro, 476 A.2d at 348. The Court then ruled that the Superior Court also properly denied reinstatement of the appeal, because the defendant had forfeited his appeal by escaping during the pendency of the appeal:

> a defendant who elects to escape from custody forfeits his right to appellate review. It would be unseemly to permit a defendant who has rejected the appellate process in favor of escape to resume his appeal merely because his escape proved unsuccessful....
>
> Appellant's constitutional right of appeal was exercised when his matter was presented to the Superior Court for its review. That review was aborted by his criminal behavior.

Passaro, 476 A.2d at 349.

Reviewing these decisions, the Third Circuit concluded that, as of *1986*, Pennsylvania fugitive waiver law did not "firmly establish" that the absolute

forfeiture rule of Passaro applied to a prisoner who escaped but was returned to custody prior to the filing of an appeal:

> Pennsylvania's fugitive forfeiture rule after Passaro can described as follows: if the defendant is returned to custody while his appeal is pending, an appellate court has the discretion to hear the appeal, but if the defendant is returned to custody after the appeal is dismissed an appellate court lacks the discretion to reinstate and hear the appeal.
>
> It is clear from these decisions, which reflect the state of the law at the time of petitioner's escape, that Pennsylvania law afforded appellate courts different degrees of discretion depending on the posture of the appeal upon a former fugitive's return to custody. Pennsylvania law had never confronted the situation that arises in the instant case where petitioner's flight had ended and custody had been restored before the appellate process was ever initiated. Thus, it was not "firmly established" that Pennsylvania courts lacked the discretion to hear an appeal first filed after custody had been restored. Under the Galloway rationale a court would have the discretion to hear an appeal filed by such a defendant because the defendant would be in custody during the entire pendency of his appeal and subject to the enforcement of any order entered as a result thereof.... Therefore, the state courts in this case did not rely on an "adequate" procedural rule to deny petitioner a review of his appeal on the merits.

Doctor, 96 F.3d at 685-86.[36]

As with the petitioner in Doctor, here the Petitioner was "in custody during the entire pendency of his appeal and subject to the enforcement of any order entered as a result thereof." Id. Accordingly, to the extent that the Pennsylvania Supreme Court applied the absolute forfeiture rule of Passaro, the rule it applied was not "firmly established" at the time of the alleged default.[37]

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[36] The Commonwealth relies heavily on Feigley v. Fulcomer, 833 F.2d 29 (3d Cir. 1987), where the Third Circuit found the petitioner's claim barred under the fugitive waiver rule. See, e.g., *Response* at 78-80. In Doctor, however, the Third Circuit distinguished Feigley on grounds that are also applicable here – that the fugitive waiver rule was applied where the appellant was a fugitive during post-trial proceedings, but not during the actual appellate process. Doctor, 96 F.3d at 683 n.7. Because appellate review had not commenced at the time of Petitioner's escape, the Commonwealth's attempt to distinguish Doctor, see *Response* at 80 n.2, is unavailing. Accordingly, it is the Doctor majority opinion that is controlling here, not either Feigley or Judge Scirica's concurring opinion in Doctor.

[37] Since Passaro, Pennsylvania's fugitive waiver rule has undergone several changes. Although not directly relevant to the issue whether any of the rules applied in Kindler-1 and Kindler-2 were firmly established in 1984, familiarity with these changes may make the Kindler decisions more comprehensible, and illustrates that the rule has never been consistently applied.

As Doctor notes, the application of Passaro to a person who escapes during trial court proceedings but is returned to custody prior to direct appeal remained an open question after Passaro. In Commonwealth v. Luckenbaugh, 550 A.2d 1317 (Pa. 1988) (per curiam), the Court applied Passaro to that situation. See Commonwealth v. Jones, 564 A.2d 983, 985-87 (Pa. Super. 1989) (en banc) (Luckenbaugh effectively overruled Galloway, applying

The position that the plurality espoused – a modified version of the holding of Ortega-Rodriguez v. United States, 507 U.S. 234 (1993) – was also not firmly established as of 1984. There is no indication that the plurality position existed in the law of Pennsylvania prior to Kindler-1. In Kindler-1, the plurality cited no Pennsylvania authority for its position. Rather, the plurality recognized that Petitioner's case was different from those, such as Passaro, in which the appellant was a "fugitive[] from justice during the appellate process." Kindler-1, 639

Passaro for the first time to a defendant in these circumstances). In Commonwealth v. Jones, 610 A.2d 439, 441 (Pa. 1992), the Pennsylvania Supreme Court confirmed this reading of Luckenbaugh, holding that escape at any time post-trial is an absolute and irrevocable forfeiture of the right to appeal. In Commonwealth v. Huff, 658 A.2d 1340, 1341-42 (Pa. 1995), the Court retreated from this absolute forfeiture rule, finding no irrevocable forfeiture where the defendant escaped and was recaptured prior to sentencing, and the trial court exercised its discretion to consider the defendant's post-verdict motions. In In the Interest of J.J., 656 A.2d 1355 (Pa. 1995), the Court held that in a juvenile case that an appellate court has the discretion to consider an appeal if the defendant has been returned to custody, even if the defendant escaped during the appellate process. As the Court noted in Commonwealth v. Deemer, 705 A.2d 827, 829 n.2 (Pa. 1997), Huff and J.J. effectively overruled the absolute forfeiture rule of Jones. In Deemer, the Court completed that process, explicitly rejecting Jones' "absolute ... forfeiture" rule, and allowing a defendant to pursue an appeal as long as his time for doing so had not expired during the time he was a fugitive. Deemer, 705 A.2d at 829.

Thus, Kindler-1 was decided during the brief ascendency of the Jones absolute forfeiture rule, providing some support for the belief that the plurality was applying some form of that rule. See Deemer, 705 A.2d at 829 n.2 (discussing Kindler, and reaching this conclusion).

A.2d at 3. The plurality indicated that it was required to *decide* whether a trial court has the authority to dismiss post-verdict motions (and refuse to reinstate them) as a result of a defendant's flight. Id. In deciding that issue, it relied heavily on the United States Supreme Court's 1993 decision in Ortega-Rodriguez.[38] See Kindler-1 at 3.

The plurality position did not exist prior to 1994. It relied heavily on a decision rendered only the year before by the United States Supreme Court. Self-evidently, the plurality position was not a "firmly established" rule as of 1984.

2. No version of the fugitive waiver rule was applied to a capital case until well after 1984.

The application of the fugitive waiver rule to capital cases was not "firmly established" as of 1984. There are no pre-1984 Pennsylvania cases applying the Passaro rule – or any variation of the fugitive waiver rule – to capital cases.

Indeed, well after 1984 the Court avoided applying the rule to capital cases. This is most clearly illustrated by Commonwealth v. Lewis, 567 A.2d 1376 (Pa. 1989). In Lewis, the Court declined to address the issue, noting that it was a "*question of first impression*" that would be better addressed "*in a case wherein the appellant's escape* ***actually results in a disruption***

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[38] While the plurality relied heavily on Ortega-Rodriguez, the position it actually adopted was quite different from that adopted in Ortega-Rodriguez. See part D.5, infra.

of the appellate process." Id. at 1378 n.1. It further noted that "*the issue of quashing the direct appeal from a death penalty requires a more in-depth record and review than the present case permits.*" Id. Thus, as of 1989, the application of the fugitive waiver rule to a capital appeal was still a question of first impression, and the Court was not inclined to apply the rule in the absence of actual disruption of the appellate process. In other words, there was no firmly established rule for capital cases as of 1984, or even 1989.

Nor was there a consistently applied rule as of 1984. Indeed, Mr. Lewis and Mr. Kindler escaped at the same time, see N.T. 10/23/84 at 17-18, 38, 41-43, 54, but the Court did not apply the same rule to their separate appeals.

Similarly, in the capital case of Commonwealth v. Yarris, 549 A.2d 513 (Pa. 1988) (Yarris-1), the Court had remanded the appeal for a hearing on the appellant's claims that counsel was ineffective. Mr. Yarris escaped while being transported to the hearing. See Commonwealth v. Yarris, 731 A.2d 581, 584 (Pa. 1999) (Yarris-3). The Commonwealth moved to quash the appeal. After hearing oral argument on the motion, see id., the Court denied the motion to quash and again remanded for an evidentiary hearing. Commonwealth v. Yarris, 518 A.2d 261 (Pa. 1986) (Yarris-2).

Following the hearing, the Court heard Mr. Yarris' appeal in its entirety, including the ineffectiveness claims. It specifically rejected the Commonwealth's contention that the ineffectiveness claims were not cognizable. Yarris-1, 549 A.2d at 529 n.2.

The first decision applying Passaro – or any other fugitive waiver rule – to a capital case was Commonwealth v. Judge, 609 A.2d 785 (Pa. 1992). Judge did not rely on any Pennsylvania decisions, but on prior decisions from other jurisdictions. Id. at 786-87, citing, e.g., Allen v. Georgia, 166 U.S. 138 (1897). Those decisions, however, did not consider Pennsylvania's appellate and capital punishment system, which includes, *inter alia*, a state constitutional right to appeal, see PA. CONST. Art. V, § 9; a statutory right to an automatic appeal to the Pennsylvania Supreme Court for capital defendants, see 42 Pa. C.S. § 9711(h)(1); and a right to meaningful appellate review under the United States Constitution. See Parker v. Dugger, 498 U.S. 308, 321 (1991). Nor did Judge or the decisions it cited deal with the circumstances of Petitioner's case, in which the escape took place prior to sentencing, and Petitioner was in custody throughout the actual appeal. As of 1984, it was not "firmly established" that any version of the fugitive waiver rule would apply to capital cases. Nor was any version of the fugitive waiver rule consistently applied in such cases. In fact, the *first* time the rule was applied was in *1992*.

3. The court's refusal to apply the relaxed waiver rule to a fugitive waiver was not firmly established as of 1984.

The plurality asserted that Petitioner's appeal "comes to us without any allegations of error (direct or collateral) preserved," Kindler-1 at 3, and treated Petitioner's case like those in which a capital appellant voluntarily waives an appeal altogether, and those in which a capital appellant is a fugitive during the appellate process. Id. Implicit in this position was the

plurality's refusal to apply the capital case "relaxed waiver" doctrine, see infra, which otherwise would have required the Court to reach the merits of all issues raised by an appellant in a capital case, regardless of whether they were "preserved" at trial. In Kindler-2, the Court made that refusal explicit. Kindler-2, 722 A.2d at 148 n.13.

As of 1984, however, it was not "firmly established" that the "relaxed waiver" doctrine would not apply to such a case. Rather, in 1984 and until well after 1984, the only firmly established rule in Pennsylvania capital cases was that court-made waiver rules, like the fugitive waiver rule, *did not apply to capital cases*.

The law in Pennsylvania capital cases until late 1998 was one of relaxed waiver. Under the relaxed waiver doctrine, *all* claims presented in a capital case were reviewed on the merits, regardless of any waiver or procedural bar that might otherwise apply. This doctrine was announced in the case of Commonwealth v. McKenna, 383 A.2d 174 (Pa. 1978). After McKenna, and until late 1998, the Pennsylvania Supreme Court repeatedly and consistently applied this capital case "relaxed waiver rule," and required that claims raised in capital cases be afforded merits review and that procedural bars to such review not be applied.[39] The

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[39] See, e.g., Commonwealth v. Morales, 701 A.2d 516, 520 n.13 (Pa. 1997) ("A finding that appellant waived a claim would not prove fatal since this Court's practice has been to address all waived issues which have been raised in PCRA death penalty petitions."); Commonwealth v. Jermyn, 709 A.2d 849, 856 n.20 (Pa. 1998) ("this court has addressed all issues arising in a death penalty case, irrespective of a finding of waiver"); Commonwealth v. Brown, 711 A.2d 444, 455-56 (Pa. 1998) ("This Court generally

applies a relaxed waiver rule in capital cases because of the permanent, irrevocable nature of the death penalty."); Commonwealth v. Spotz, 716 A.2d 580, 591 (Pa. 1998) (reviewing waived claim on the merits because of "our practice to relax waiver rules in capital cases"); Commonwealth v. Travaglia, 661 A.2d 352, 356 n.6 (Pa. 1995) (Pennsylvania courts "address [on the merits] all issues arising in a death penalty case, irrespective ... of waiver."); Commonwealth v. Wharton, 665 A.2d 458, 462 (Pa. 1995) ("this Court relaxes its waiver rules in matters involving the death penalty"); Commonwealth v. Hill, 666 A.2d 642, 648 (Pa. 1995) ("this Court does not rigidly adhere to the rules of waiver in death penalty cases"); Commonwealth v. Chester, 587 A.2d 1367, 1382 n.9 (Pa. 1991) ("our rules of waiver are relaxed in death penalty cases"); Commonwealth v. Beck, 560 A.2d 1370, 1374 (Pa. 1989) ("We ... relax the rule of waiver in capital punishment cases specifically in order to get to the truth."); Commonwealth v. Nelson, 523 A.2d 728, 736 (Pa. 1986) ("[I]n capital cases we have relaxed the traditional waiver concepts because of the uniqueness of the penalty involved, and permit an assessment of the alleged error on its merits."); Commonwealth v. Pirela, 507 A.2d 23, 27 n.2 (Pa. 1986) (same); Commonwealth v. Frey, 475 A.2d 700, 707 n.4 (Pa. 1984) (noting "relaxation of the waiver rules in death penalty cases wherein this Court will address and, if possible from the record, resolve all significant issues perceived by this Court or raised by the parties"); Commonwealth v. Banks, 656 A.2d 467, 470 n.7 (Pa. 1995) ("The Commonwealth contends that all of the issues raised in Appellant's post-conviction petition are waived .... While we agree that some of the issues presented ... could be deemed waived under the PCRA, we will nevertheless address all of Appellant's claims since ... it is this Court's practice to address all issues arising in a death penalty case irrespective of a finding of waiver."); Commonwealth v. Christy, 656 A.2d 877, 881 n.2, 885 n.14, 886 n.15 (Pa. 1995) (same); Commonwealth v. Morris, 684 A.2d 1037, 1042 n.11 (Pa. 1996) (same); Commonwealth v. Simmons, 662 A.2d 621, 636 (Pa. 1995) ("relaxed waiver rule for capital cases requires us to examine this issue" that was not properly presented); Commonwealth v. Abu-Jamal, 555 A.2d 846, 854 (Pa. 1989) ("[W]ere this not a capital case, this claim of error would be summarily dismissed as having been waived. ... Nevertheless, we will address it on the merits in light of

capital case relaxed waiver rule was applied without

'relaxation' of the waiver rule ... in capital cases"); Commonwealth v. Baker, 511 A.2d 777, 790 n.10 (Pa. 1986) ("Appellant's argument cannot be considered waived because ... relaxation of the waiver rules exists in death penalty cases"); Commonwealth v. Walker, 656 A.2d 90, 98-99 (Pa. 1995) ("[T]he issue is waived. However, since this Court has developed a relaxed standard regarding waiver rules in capital cases, we will address the underlying claim."); Commonwealth v. Gibson, 688 A.2d 1152, 1160 n.13, 1161 n.15, 1162 n.19, 1163 n.23 (Pa. 1997) (same); Commonwealth v. Washington, 692 A.2d 1024, 1030 n.11 (Pa. 1997) (same); Commonwealth v. Marinelli, 690 A.2d 203, 214 n.19 (Pa. 1997) (same); Commonwealth v. Gribble, 703 A.2d 426, 436-37 (Pa. 1997) (same); Commonwealth v. Elliott, 700 A.2d 1243, 1252 n.21 (Pa. 1997) (same); Commonwealth v. Speight, 677 A.2d 317, 326, n.15 (Pa. 1996) (same); Commonwealth v. Cook, 676 A.2d 639, 649, n.26 (Pa. 1996) (same); Commonwealth v. May, 656 A.2d 1335, 1343 n.7 (Pa. 1995) (same); Commonwealth v. Miller}plain , 664 A.2d 1310, 1322, 1320 n.7, 1323 n.22, (Pa. 1995) (same); Commonwealth v. Johnson, 668 A.2d 97, 102 nn.12, 14-15, 18, 20-21 (Pa. 1995); Commonwealth v. DeHart, 650 A.2d 38, 48 (Pa. 1994) (same); Commonwealth v. Crispell, 608 A.2d 18, 22 n.1 (Pa. 1992) (same); Commonwealth v. Billa, 555 A.2d 835, 942 (Pa. 1989) (same); Commonwealth v. Harris, 703 A.2d 441, 445 nn.5, 7, 9 (Pa. 1997) (same); Commonwealth v. Miles, 681 A.2d 1295, 1301 n.8 (Pa. 1996) (same); Commonwealth v. LaCava, 666 A.2d 221, 228 n.8 (Pa. 1995) (same); Commonwealth v. Paolello, 665 A.2d 439, 453 n.11 (Pa. 1995) (same); Commonwealth v. Yarris, 549 A.2d 513, 521 (Pa. 1988) (same); Commonwealth v. Lesko, 501 A.2d 200, 207 (Pa. 1985) (addressing merits of waived claim); Commonwealth v. Zettlemoyer, 454 A.2d 937, 955 (Pa. 1982) (declining to allow waiver in capital cases because of the "final and irrevocable nature of the death penalty" and "for the reasons stated in" McKenna); see Louis Natali, Jr., New Bars in Pennsylvania Capital Post-Conviction Law and Their Implications for Federal Habeas Corpus Review, 73 Temple L.Rev. 69, 88-91 (2000) ("New Bars").

regard to the type of claim,[40] and was applied whether the claim was raised on direct appeal[41] or under the PCRA.[42] In short, the relaxed waiver rule was the waiver law for Pennsylvania capital cases, from 1978 until late 1998. The rule was that bars against merits review were not applied to capital cases – they were trumped by the relaxed waiver rule.

Recognizing these facts, this Court and the Third Circuit have held that there was no firmly established and regularly followed Pennsylvania procedural bar rule in capital cases at the times relevant to Mr. Kindler's case, and thus no "adequate" bar to federal merits review.[43] The Commonwealth's procedural

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[40] With one narrow exception that does not apply here. See Section I.C.3, infra (discussing Witherspoon claims).

[41] E.g., May; Crispell; Nelson; Pirela.

[42] E.g., Morales; Jermyn; Christy; Banks; Travaglia; DeHart; Lesko.

[43] See, e.g., Jermyn v. Horn, 266 F.3d 257, 278-79 (3d Cir. 2001) (Pennsylvania Supreme Court's denial of capital PCRA claims on procedural grounds not adequate state ground); Banks v. Horn, 126 F.3d 206 (3d Cir. 1997) (in Pennsylvania capital PCRA cases, no adequate state ground as of late 1997); Fahy v. Horn, 240 F.3d 239, 245 (3d Cir. 2001) (similar holding); Laird v. Horn, 159 F. Supp.2d 58, 73-75 (E.D. Pa. 2001) (Pennsylvania Supreme Court's denial of capital PCRA claims on procedural grounds not adequate state ground); Jacobs v. Horn, 129 F. Supp.2d 390, 397-99 (M.D. Pa. 2001) (same); Peterkin v. Horn, 176 F. Supp.2d 342, 353-55, (E.D. Pa. 2001) (same); Bronshtein v. Horn, 2001 WL 767593 (E.D. Pa. July 5, 2001) (same); Pursell v. Horn, 187 F. Supp.2d 260, 290-97 (W.D. Pa. 2002) (same); Natali, *New Bars*.

default assertion is contrary to these precedents and erroneous.[44]

In particular, the relaxed waiver rule applied to the failure to raise claims in post-verdict motions. Beginning with Zettlemoyer, and continuing to the present, the Pennsylvania Supreme Court has reviewed the merits of claims on direct appeal in capital cases, even though the appellants technically waived those claims by failing to raise them in post-verdict (now post-sentence) motions.[45] The plurality and concurring Justices asserted that Petitioner's claims were waived because the trial court properly dismissed the post-verdict motions. Kindler-1, 639 A.2d at 3-4 (plurality opinion); id. at 8 & n.1 (Cappy, J., concurring). But under the relaxed waiver rule, Petitioner had a right to have his claims heard on appeal *even though they were not properly preserved in the post-verdict motions*. Not until Kindler-1 had the Court ever hinted that this application of the relaxed waiver rule – consistently followed since Zettlemoyer

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[44] Indeed, given the above cited precedents of the Pennsylvania Supreme Court and the Third Circuit, the Commonwealth's assertion, *Response* at 86, that relaxed waiver was a "discretionary exception" to Pennsylvania's waiver rules, is frivolous and absurd.

[45] See, e.g., Commonwealth v. Paddy, 800 A.2d 294, 306 n.5 (Pa. 2002) (reviewing ineffective assistance claim that was waived because not raised in post-sentence motion); Commonwealth v. Carson, 741 A.2d 686, 697 (Pa. 1999) (same); Speight, 677 A.2d at 325 n.15 (same); Miller, 664 A.2d at 1323 n.22 (same); Abu-Jamal, 555 A.2d at 854 (addressing issue despite failure to object at trial or raise in post-trial motion); Zettlemoyer, 454 A.2d at 955 & n.19 (reviewing issue that was waived because not included in post-verdict motions).

– was not available to defendants who had post-verdict motions dismissed because they were fugitives.

Mr. Kindler's claims cannot be deemed procedurally defaulted. The Pennsylvania Supreme Court did not *hold* that the relaxed waiver rule does not apply to a capital defendant who escapes during the trial proceedings until Kindler-2 in 1999. It did not make any ruling inconsistent with the normal application of the relaxed waiver rule before Judge in 1992. The rule that relaxed waiver does not apply to fugitives, particularly to fugitives who are in custody during the appellate process, was not "firmly established" in 1984.

4. The "compelling reason" rule was neither "firmly established" as of 1984, nor independent of federal law.

i. The concurring Justices ruled that when a capital appellant escapes while post-verdict motions are pending, the trial court has the authority to dismiss the post-verdict motions, and must reinstate them only if the appellant shows a "compelling reason" for doing so. Kindler-1, 639 A.2d at 8 (Cappy, J., concurring). This "compelling reason" rule was not "firmly established" in 1984.

In support of the "compelling reason" rule, Justice Cappy cited his concurring opinion in Passaro, his dissenting opinion in Judge, and the United States Supreme Court's 1993 opinion in Ortega-Rodriguez. Obviously, none of those decisions were "firmly established" as of 1984, nor is counsel aware of any other authority that would support the existence of the "compelling reason" rule prior to 1984.

ii. The "compelling reason" rule is not independent of federal law. A state court procedural waiver rule is not "independent," and therefore cannot create a federal court procedural default, if the state court rule is "interwoven with federal law," Michigan v. Long, 463 U.S. 1032, 1040 (1983), or when application of the state court rule "depend[s] on an antecedent ruling on federal law." Ake v. Oklahoma, 470 U.S. 68, 75 (1985).

While the concurring Justices did not spell out in detail the nature of a "compelling reason," presumably it would include a particularly compelling claim of federal constitutional error. Because the "compelling reason" procedural default rule is thus dependent on an "antecedent ruling on federal law," it is not "independent" of federal law. See, e.g., Hull v. Kyler, 190 F.3d 88, 101 n.4 (3d Cir. 1999) (Pennsylvania's miscarriage of justice review interwoven with merits of federal claims); Johnson v. Gibson, 169 F.3d 1239, 1249 (10th Cir. 1999) (procedural bar not "independent" state ground where state court reviewed claim for "fundamental error"); Jones v. Jerrison, 20 F.3d 849, 854 (8th Cir. 1994) (no federal bar where state court reviewed merits of defaulted claim as part of "plain error" review).

5. The state courts' refusal to review the merits of Petitioner's claims was not "adequate" to bar federal habeas review because it was unreasonable and violated due process.

The rules applied in Kindler-1 and Kindler-2 are inadequate for yet another reason – they are unreasonable, and violate due process and the Eighth

Amendment. A state procedural rule is not adequate to bar federal habeas review if the rule itself violates the United States Constitution. Staub v. City of Bexley, 355 U.S. 313, 318-20 (1958) (state court's reliance on an unconstitutional ordinance cannot serve as adequate ground for its judgment); Doan v. Brigano, 237 F.3d 722, 728 (6th Cir. 2001) (state evidentiary rule alleged to prevent petitioner from showing that his right to a fair and impartial jury was violated was not adequate and independent basis for state court decision); Klobuchir v. Commonwealth, 639 F.2d 966, 971 n.13 (3d Cir. 1981) (for a state rule to be an adequate and independent state ground, it must be "constitutionally sound") (*dicta*). The state rules applied here are arbitrary and unreasonable, and violate due process, and deprived Petitioner of his right to meaningful appellate review of his conviction and death sentence.

A state appellate court's dismissal of an appeal, based on the appellant's status as a fugitive at the time of the dismissal, does not necessarily violate due process. Allen v. Georgia, 166 U.S. 138 (1897). In such circumstances, the dismissal is reasonable because it is based on concerns with the enforceability of any ruling by the appellate court, Smith v. United States, 94 U.S. 97 (1876), and because dismissal "serves an important deterrent function and advances an interest in dignified appellate practice." Ortega-Rodriguez v. United States, 507 U.S. 234, 242 (1993) (citing Estelle v. Dorrough, 420 U.S. 534, 537 (1975)). When, however (as here), the defendant flees during trial court proceedings but is "recaptured before he invokes the jurisdiction of the appellate tribunal," id., the above rationales do not apply.

In Ortega-Rodriguez, the Court reviewed the Eleventh Circuit's application of its fugitive forfeiture rule, which resulted in the automatic dismissal of the appeal of the defendant, who had fled and been returned to custody prior to sentencing. Id. at 242-44. Exercising its supervisory authority, the Supreme Court considered whether the Eleventh Circuit rule represented a "reasoned exercise[]" of that court's authority. Id. at 244. The Court concluded that the rule was not a "reasonable response" in such circumstances, because the justifications offered for the rule "are necessarily attenuated when applied to a case in which both flight and recapture occur while the case is pending before the [trial] court, so that a defendant's fugitive status at no time coincides with his appeal." Id.

The Court rejected the applicability in these circumstances of all of the justifications advanced for the fugitive forfeiture rule.

First, the Court noted that "enforceability" of the appellate court's ruling is not a valid concern when the defendant has been "returned to custody before he invokes the appellate process." Id.

Second, the Court found that the "'efficient ... operation' of the appellate process, ... will not be advanced by dismissal of appeals filed after former fugitives are recaptured." Id. at 245 (quoting Estelle, 420 U.S. at 537). Any extraneous matters relating to the escape itself will ordinarily be resolved in the trial court, thus eviscerating any justification for dismissal in the appellate court. Id.

Third, "dismissal of appeals filed after recapture [does not] operate to protect the 'digni[ty]' of an appellate court." Id. While acknowledging that escape may "operate[] as an affront to the dignity of the court's proceedings," id. at 246, the Court ruled that because the affront is to the trial court, not the appellate court, it does not justify dismissal by the appellate court:

> We cannot accept an expansion of this reasoning that would allow an appellate court to sanction by dismissal any conduct that exhibited disrespect for any aspect of the judicial system, even where such conduct has no connection to the course of appellate proceedings. Such a rule would sweep far too broadly, permitting, for instance, this Court to dismiss a petition solely because the petitioner absconded for a day during district court proceedings, or even because the petitioner once violated a condition of parole or probation. None of our cases calls for such a result, and we decline today to adopt such an approach.

Id. at 246-47 (citation omitted).

Fourth, the deterrence rationale of Estelle likewise provided no support for the fugitive forfeiture rule, because any required deterrence could be fulfilled by the trial court's authority to adopt appropriate sanctions short of dismissal. Id. at 247. The Court approved Justice Stewart's dissenting opinion in Estelle, in which Justice Stewart noted that "*punishment by appellate dismissal introduces an element of arbitrariness and irrationality into*

sentencing for escape." Id. at 248. In a footnote, the Court quoted Justice Stewart's dissent at length:

> [T]he statute imposes *totally irrational punishments* upon those subject to its application. If an escaped felon has been convicted in violation of law, the loss of his right to appeal results in his serving a sentence that under law was erroneously imposed. If, on the other hand, his trial was free of reversible error, the loss of his right to appeal results in no punishment at all. And those whose appeals would have been reversed if their appeals had not been dismissed serve totally disparate sentences, dependent not upon the circumstances of their escape, but upon whatever sentences may have been meted out under their invalid convictions.

Id. at 249 n.20 (quoting Estelle, 420 U.S. at 444 (Stewart, J., dissenting)).

Accordingly, the Court found that there was no reasoned basis for the Eleventh Circuit rule:

> Accordingly, we conclude that while dismissal of an appeal pending while the defendant is a fugitive may serve substantial interests, *the same interests do not support a rule of dismissal for all appeals filed by former fugitives*, returned to custody before invocation of the appellate system. Absent some connection between a defendant's fugitive status and his appeal, as provided when a defendant is at large during "the ongoing appellate process," the justifications advanced

> for dismissal of fugitives' pending appeals generally will not apply.

Id. at 249 (quoting Estelle, 420 U.S. at 542 n.11).

Although Ortega-Rodriguez was decided in the Court's supervisory capacity and does not hold that application of a fugitive forfeiture rule in such circumstances violates due process, it has obvious due process implications.[46] The basis for the Ortega-Rodriguez decision is that the application of the fugitive forfeiture rule to people situated like Petitioner has no reasoned basis and results in the infliction of arbitrary and irrational punishments. It has long been recognized that the substantive due process guarantee protects against the "exercise of [governmental] power without any reasonable justification in the service of a legitimate governmental objective." County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998). Moreover, the arbitrary and irrational imposition of the death penalty violates the Eighth Amendment. Furman v. Georgia, 408 U.S. 238 (1972). Thus, at a minimum the Commonwealth must be able to offer a reasonable justification for its application of the fugitive waiver

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[46] See, e.g., Woods v. Kemna, 13 F.3d 1244, 1246 (8th Cir. 1994) (similarly situated petitioner had viable due process claim under Ortega-Rodriguez); United States v. $40,877.59 in United States Currency, 32 F.3d 1151, 1154 (7th Cir. 1994) (application of fugitive forfeiture rule to bar citizen from contesting asset forfeiture "may be a violation of due process"); cf. Degen v. United States, 517 U.S. 820, 824-28 (1996) (reversing application of fugitive forfeiture rule in similar case on grounds similar to Ortega-Rodriguez, while declining to reach due process issue).

rule to Petitioner. Given Ortega-Rodriguez, it cannot do so.

Both the plurality and the concurrence in Kindler-1 attempted to frame Pennsylvania's rule in a manner responsive to Ortega-Rodriguez, but both failed in the attempt. Apparently recognizing that Ortega-Rodriguez would not permit an appellate court to support a dismissal on the basis of the fugitive forfeiture rule, the plurality and concurrence located the actual dismissal in the trial court, and justified the trial court's actions as a "reasonable response to Appellant's 'flouting' of the court ...." Kindler-1, 639 A.2d at 3; see id. at 8 & n.1 (Cappy, J., concurring).

By locating the significant action in the trial court, Kindler-1 apparently defused the clear import of Ortega-Rodriguez – that there is no reasonable justification for appellate court dismissal of an appeal where the defendant has been returned to custody prior to the appellate court taking jurisdiction. Kindler-1 provided a veneer of justification for this action – if the trial court properly dismissed the post-verdict motions, then Petitioner's claims were "not properly preserved for appellate review, must be considered waived, and may not be considered on appeal." Id. at 8 n.1 (Cappy, J., concurring). Comparison with Ortega-Rodriguez reveals, however, that there is still no reasonable justification for Kindler-1.

First, Ortega-Rodriguez rests in part on the fact that a trial court faced with a defendant who has fled but been recaptured "can tailor a more finely calibrated response" than the "blunderbuss of dismissal," which is the only response available to an

appellate court. Ortega-Rodriguez, 507 U.S. at 247. Where the trial court's response, however, has the effect of leading to a dismissal of the appeal, then it results in the same arbitrary imposition of a severe additional penalty for the escape that was condemned as arbitrary in Ortega-Rodriguez. Id. at 248.

Indeed, in Ortega-Rodriguez, the Court condemned as arbitrary increasing the punishment for the defendant's escape from the term of 21 months imposed by the District Court by adding the term of 15 years which the defendant was to serve for his underlying, but potentially unlawful sentence as the result of the dismissal of the appeal. Id. at 248-49. Here, in contrast, the additional punishment was far more severe – in addition to any other punishment for his escape, Petitioner was to be subjected to a possibly unlawful execution. That sentence, however, would be just as arbitrary as the increased sentence imposed on Mr. Ortega-Rodriguez.

Second, the imposition of an arbitrary death sentence – and the sentence imposed on Mr. Kindler is clearly arbitrary under Ortega-Rodriguez – directly violates the Eighth Amendment to the Constitution. Furman.

Third, the notion that dismissal of post-verdict motions necessarily prevents any issues from being considered on direct appeal has no application to a capital case in Pennsylvania. Under the relaxed waiver rule, any other defendant sentenced to death can raise issues that were not properly preserved in

post-verdict motions.[47] By refusing to apply that rule to Mr. Kindler's benefit, the Pennsylvania Supreme Court itself denied Mr. Kindler his right to appeal, independent of the trial court's action.

The Pennsylvania Supreme Court cited no justification for that action other than Mr. Kindler's "flouting" of the trial court process. "Flouting" of the trial court process, however, does not provide a rational justification for dismissal of an appeal. Ortega-Rodriguez, 507 U.S. at 246-47. *A fortiori*, it provides no rational justification for dismissing PCRA proceedings. Accordingly, the application of the fugitive forfeiture rule to Mr. Kindler violated his right to substantive due process and, because this is a capital case, his rights under the Eighth Amendment. As such, that rule is not adequate to bar federal habeas review of the merits of Mr. Kindler's claims.

6. The rulings made by the Court in *Kindler-2* Were not Adequate to Bar federal habeas review of the merits.

a. The Kindler-2 Court's "previously litigated" ruling was not adequate to bar federal habeas review, both because Petitioner did not violate any clearly applicable rule, and because it was not

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[47] E.g., Commonwealth v. Robinson, 721 A.2d 344, 354 n.14 (Pa. 1999); Commonwealth v. Johnson, 668 A.2d 97, 102 n.12 (Pa. 1995); Commonwealth v. Miller, 664 A.2d 1310, 1322 (Pa. 1995); Commonwealth v. Walker, 656 A.2d 90, 99 (Pa. 1995); Commonwealth v. Crispell, 608 A.2d 18, 22 n.1 (Pa. 1992); Commonwealth v. Thomas, 561 A.2d 699, 704 (Pa. 1989); Commonwealth v. Zettlemoyer, 454 A.2d 937, 955 n.19 (Pa. 1983).

"firmly established" in 1984 that escape waived the right to seek PCRA relief.

i. Under the PCRA, an "issue has been previously litigated if the highest appellate court in which the petitioner could have had review has ruled on the merits of the issue." Kindler-2 at 147; 42 Pa. C.S. § 9544(a)(2).

On direct appeal, the primary issue was whether Petitioner's escape resulted in a waiver of his right to review of the conviction and death sentence. The separate issue whether – if the appeal was unsuccessful – Petitioner could seek PCRA review of his conviction and death sentence was not before the Court. Nothing in the PCRA indicates that the Pennsylvania Supreme Court may rule on direct appeal with respect to the availability of PCRA relief. Nor did Petitioner raise on direct appeal the availability of PCRA relief. Thus, neither in the PCRA or elsewhere was there any authority for the Pennsylvania Supreme Court to rule on direct appeal that Petitioner had waived his right to PCRA review.

ii. If such a rule – that the Pennsylvania Supreme Court may decide on direct appeal the appellant's eligibility for PCRA review – exists at all, it was created for the first time in Kindler-2. It was not "firmly established" either in 1984, or when Petitioner sought review of his conviction and death sentence. Indeed, the rule is inconsistent with the treatment of prisoners who voluntarily waive direct appeal – to whom the Court compared Petitioner in Kindler-1. See Kindler-1 at 4 & n.2. A prisoner who voluntarily waives direct appeal may still obtain review of his claims under the PCRA. See, e.g.,

Commonwealth v. Michael, 755 A.2d 1274 (Pa. 2000) (reviewing on merits PCRA claims of prisoner who waived direct appeal); Commonwealth v. Appel, 689 A.2d 891 (Pa. 1997) (same).

iii. Even if the application of "previously litigated" here had been "firmly established," it still would not constitute a finding of procedural default. If the applicability of the fugitive waiver rule to PCRA proceedings was previously litigated, that took place when Petitioner raised the issue during his direct appeal. If a claim has been previously raised, raising it again does not constitute a default. See Ylst v. Nunnemaker, 501 U.S. 797, 804 n.3 (1991) (when a state court decision "rests upon a prohibition against further state review," such as a rule "preventing the relitigation on state habeas of claims raised on direct appeal," "its effect upon the availability of federal habeas is nil"); Walton v. Stewart, 168 F.3d 504, 1999 WL 57427, *7-*8 (9th Cir. Feb. 5, 1999) (unpublished disposition, text on Westlaw) (where Arizona's state post-conviction Rule 32.2(a)(2) provides that "[a] defendant shall be precluded from [post-conviction] relief under this rule based upon any ground ... [f]inally adjudicated on the merits on appeal or in any previous collateral proceeding" it is not a "waiver" rule and cannot create a procedural default (citing Ylst, 501 U.S. at 804 n.3)).

b. The Pennsylvania Supreme Court also ruled that granting Petitioner a hearing on his PCRA claims, which were "already forfeited by his flight from captivity, would render meaningless all previous rulings of the trial court and this Court." Kindler-2, 722 A.2d at 148. The only support offered by the Court for this forfeiture-of-PCRA claims rule was its prior

decision in Kindler-1. The forfeiture-of-PCRA claims rule was not firmly established at any time prior to Kindler-1 (if then), rendering it inadequate to bar federal habeas merits review.

The primary rationale offered in Kindler-1 was that Petitioner's escape had a "connection" to the trial court's dismissal of post-verdict motions, because Petitioner's conduct "demonstrated absolute disrespect for the legal process and the authority of the court" in ruling on the pending post-verdict motions. Kindler-1, 639 A.2d at 3. The application of this position to PCRA proceedings clearly was not firmly established at any time prior to 1994.

First, as discussed in Part B, supra, the Kindler-1 plurality position was *created* by the plurality in 1994 in Kindler-1, and even then was not "precedential" or "decisional," because it did not command a majority of the Court.

Second, the plurality rule had no obvious application to PCRA proceedings. Neither the trial court's consideration of the post-verdict motions, nor even the Pennsylvania Supreme Court's consideration of the direct appeal, bears any necessary or immediate connection to the PCRA proceedings.

Claims may be raised in PCRA proceedings that were never raised in post-verdict motions or on direct appeal.[48] Thus, it is neither possible to draw any

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[48] Claims not raised in the prior proceedings might be considered waived under the provisions of the PCRA. 42 Pa. C.S. § 9544(b). However, at least until late 1998, such waivers were excused in

direct connection between Petitioner's conduct in escaping and review of his PCRA petition, nor had any decision prior to Kindler-2 attempted to draw such a connection.

Indeed, in Huff, supra, the Pennsylvania Supreme Court allowed the petitioner to seek PCRA relief, even though he had escaped prior to sentencing, and even though he waived his opportunity to seek direct review following the trial court's denial on the merits of his post-verdict motions. Huff, 658 A.2d at 1341-42. Thus, the forfeiture-of-PCRA review rule was not actually firmly established until *1999*, well after the alleged default occurred. As such, it is not adequate to bar federal habeas review.

c. Finally, the Court ruled that the capital case relaxed waiver doctrine did not apply to a capital PCRA petitioner who had escaped from custody after his trial. Kindler-2, 722 A.2d at 148 n.13.

That rule was not firmly established in 1984. Indeed, it was never heard of prior to Kindler-2 itself. Prior to late 1998, the Pennsylvania Supreme Court consistently applied its relaxed waiver doctrine in a manner that trumped all contrary rules, including the plain statutory language of the PCRA (which made no

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capital cases under the relaxed waiver rule, discussed above. Moreover, even after 1998, such waivers could be overcome by a showing that all prior counsel were ineffective for failing to raise the claim. 42 Pa. C.S. § 9544(a)(2)(ii). In any event, any "theoretically applicable" waiver for failing to raise the claim earlier is irrelevant, since the state courts did not rely on such a putative waiver in denying relief. Harris, supra; Smith v. Freeman, supra.

distinction between capital and non-capital cases), and provided that an issue was deemed waived and barred from merits review "if the petitioner failed to raise it and if it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or other proceeding actually conducted or in a prior proceeding actually initiated under this subchapter."[49] Thus, under the plain statutory language of the pre-1996 PCRA, "nearly all claims are waived" and barred from merits review even for a first time PCRA petitioner, "since nearly all claims potentially could have been raised on direct appeal."[50] The Pennsylvania Supreme Court applied relaxed waiver although it was *directly contrary to the plain language of the PCRA's statutory waiver provisions*.

The Pennsylvania Supreme Court apparently ruled that the relaxed waiver rule did not apply because Petitioner had forfeited his claims, rather than waived them. Kindler-2, 722 A.2d at 148 n.13. This fugitive forfeiture exception to the relaxed waiver rule, however, was never in existence prior to Kindler-2. Moreover, prior to Kindler-2, the Court repeatedly treated a defendant's or petitioner's escape as a waiver, rather than an absolute forfeiture. See, e.g., Deemer, 705 A.2d at 829 (criticizing absolute forfeiture rule of Jones); Huff, 658 A.2d at 1342 (reversing Superior Court's holding that appellant "*waived* all of

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[49] 42 Pa. C.S. § 9544(b) (prior to Jan. 16, 1996).

[50] Lambert v. Blackwell, 134 F.3d 506, 520 (3d Cir. 1998) (quoting Commonwealth v. Eaddy, 614 A.2d 1203, 1207-08 (1992)); Doctor v. Walters, 96 F.3d 675, 681 (3d Cir. 1996); Commonwealth v. Rounsely, 717 A.2d 537, 539 (Pa. Super. 1998); Commonwealth v. Stark, 658 A.2d 816, 820-21 (1995).

his appellate rights," including the right to seek PCRA review); J.J., 656 A.2d at 1365 (for an adult, an escape acts as a knowing *waiver* of his appellate rights"); Kindler-1, 639 A.2d at 3 & n.2 (comparing fugitives to defendants who waive right to direct review of death sentence); id. at 8 & n.1 (Cappy, J., concurring) (dismissal of post-verdict motions resulted in issues not being properly preserved for appellate review, as a result of which, they "must be considered *waived*").

The court-made fugitive waiver rule treated the fact that a defendant had escaped post-trial as a waiver, in some circumstances, of direct appellate review. Prior to Kindler-2, there was no "firmly established" rule that the capital case relaxed waiver doctrine did not apply to the fugitive waiver rule, just as it applied to the waiver provisions contained in the PCRA statute. Accordingly, Kindler-2 is not adequate to bar review of the claims raised in the PCRA petition.

7. There is no procedural default of claims actually reviewed by the Pennsylvania Supreme Court as part of its mandatory appellate review.

As discussed in Part II.C, supra, all of Petitioner's record-based claims are exhausted by virtue of Pennsylvania's mandatory appellate review in capital cases, which it conducted in spite of Petitioner's prior fugitive status. Where, as here, a state court's review for "passion, prejudice or other arbitrary factor," 42 Pa. C.S. § 9711(h)(3), necessarily involves review of the merits of the petitioner's claims, there is no "independent" state decision that could act as a bar to federal habeas merits review. Beam v. Paskett, 3 F.3d

1301, 1307 (9th Cir. 1993). A subsequent default (if any) would not preclude merits review. Ylst v. Nunnemaker, 501 U.S. 797, 805 (1991) (since petitioner not required to exhaust all possible state avenues for review, once claim was exhausted on direct appeal, procedural ruling in subsequent proceeding does not bar federal habeas review).

IV. PETITIONER IS ENTITLED TO HABEAS RELIEF.[51]

CLAIM I. MR. KINDLER'S DEATH SENTENCE MUST BE VACATED BECAUSE HE WAS SENTENCED BY A JURY THAT BELIEVED IT COULD NOT RETURN A VERDICT AT THE PENALTY PHASE WITHOUT AGREEING UNANIMOUSLY BOTH AS TO INDIVIDUAL MITIGATING CIRCUMSTANCES AND AS TO THE PROPER ULTIMATE PENALTY.

A. This Claim Was Exhausted on Direct Appeal and Is not Subject to Any Adequate State Procedural Default Ruling.

As discussed at length in Part III, supra, there is no adequate procedural default that could preclude merits review of Petitioner's claims. In particular, Claim I – a claim that the trial court's jury instructions violated the Eighth Amendment for reasons discussed in Mills

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[51] Petitioner does not respond herein to each and every argument raised by the Commonwealth in its lengthy *Response*. In so doing, Petitioner does not waive any of his claims or arguments. Rather, to the extent that there is no response herein, Petitioner relies on the allegations and arguments presented in the *First Amended Petition*.

v. Maryland, 486 U.S. 367 (1988) – was reviewed on direct appeal as part of the Pennsylvania Supreme Court's mandatory appellate review in capital cases.

As Chief Judge Giles recently discussed in Yarris v. Horn, 2002 WL 31432051 (E.D. Pa. Aug. 20, 2002), claims under Mills are precisely the kinds of claims that the Pennsylvania Supreme Court reviews in all capital cases:

> [T]o affirm Mr. Yarris' conviction on direct review, the Pennsylvania Supreme Court necessarily had to review whether his death sentence was the product of passion, prejudice, or any other arbitrary factor. 42 Pa. C.S. § 9711(h)(i). A jury instruction containing a Constitutional error is an arbitrary factor. In *Mills v. Maryland,* 486 U.S. 367, 374-75 (1988), the United States Supreme Court held that a death sentencing scheme was unconstitutional if it precluded the sentencer from considering and giving full effect to any mitigating aspect of defendant's character, record, or the circumstances of the offense. The case was decided on June 6, 1988, over four months before petitioner's direct appeal was decided. Thus, the authority was available to the Pennsylvania Supreme Court at the time that it reviewed Mr. Yarris' death sentence for arbitrariness. The Pennsylvania Supreme Court was obligated by statute and its own precedent to review the record for just such a Constitutional error as the allegedly impermissible jury instruction. Therefore, petitioner's *Mills* claim falls into the type of claims required to be raised and decided *sua*

> *sponte* by the Pennsylvania Supreme Court. The Court is deemed to have considered the jury instruction and concluded it was, as it stood, constitutionally firm.

Yarris at *12 (footnote omitted).

Here, likewise, Mills was decided well before Petitioner's direct appeal was decided. It must be presumed that the Court considered the merits of Petitioner's claim and denied it. Accordingly, there is no procedural default ruling with respect to Claim I, and/or any default is not adequate and independent to bar federal habeas merits review.[52]

B. The Jury Instructions, Court's Responses to Jury Questions, and Verdict Slip Violated the Eighth Amendment, and the Pennsylvania Supreme Court's Denial of Relief Was an Unreasonable Application of *Mills*.

As set forth in the *First Amended Petition*, at 18-24, the trial court's jury instructions, the court's responses to jury questions, and the verdict slip provided to the jury all violated the Eighth and Fourteenth Amendments because it is reasonably likely that the

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[52] The Commonwealth asserts that Petitioner knew he would waive claims that were not raised in post-verdict motions. *Response* at 102 n.4. In fact, however, a capital appellant could raise claims not raised in post-verdict motions, pursuant to the relaxed waiver rule. See Part III.D.3, supra. The trial court colloquy with Petitioner does not render the subsequent rulings of the Pennsylvania Supreme Court adequate to bar federal habeas merits review.

jury understood the instructions, response and verdict slip as requiring them to unanimously agree as to the presence of any mitigating factor before weighing it against the aggravating factors that the jury found beyond a reasonable doubt. It is the "height of arbitrariness to allow or require the imposition of the death penalty under such circumstances." Mills, 486 U.S. at 374. In Frey v. Fulcomer, 132 F.3d 916 (3d Cir. 1997), and Banks v. Horn, 271 F.3d 527 (3d Cir. 2001) (Banks-2), vacated on other grounds, 122 S. Ct. 2147 (2002) (Banks-3), the Third Circuit held that jury instructions and verdict slips that are materially indistinguishable from those provided here violate Mills and Boyde v. California, 494 U.S. 370 (1990), and that the Pennsylvania Supreme Court has unreasonably applied Mills in denying such claims. The court's response to the jury questions here makes the violation of bedrock Eighth Amendment principles even clearer than in Frey and Banks. See *First Amended Petition* at 22-23.

Accordingly, the controlling precedent of Frey and Banks-2 requires that this Court grant relief on Claim I.

C. The Commonwealth's Arguments.

The Commonwealth's response to Claim I on the merits covers fifteen pages. *Response* at 103-18. In those fifteen pages, the Commonwealth strives mightily to avoid what should be obvious to anyone reviewing the merits of the claim – that relief is compelled under the Third Circuit's precedents. Rather than acknowledge this fact, the Commonwealth ignores Banks-2 entirely, argues briefly that Frey was

wrongly decided, and then tries to change the subject. Ultimately, however, that effort fails.

The Commonwealth appears to argue at the outset that application of Mills to Petitioner's case would be impermissibly retroactive, because Petitioner's trial took place before Mills was decided. *Response* at 103-04. As the Commonwealth is well aware, however, the applicable date for retroactivity purposes is when Petitioner's direct appeal was denied, not the time of trial. See Lambrix v. Singletary, 520 U.S. 518, 527 (1997) (petitioner's conviction became final when time to seek certiorari after direct appeal expired).

In typically *ad hominem* language, the Commonwealth accuses Petitioner and his counsel of "attempting to con the judicial system" by arguing that a *de novo* standard of review applies to this claim. *Response* at 104. In fact, the issue of standard of review has become more complicated than it previously appeared. In the *First Amended Petition*, see, e.g., id. at 10-11, 25, Petitioner argued, citing decisions such as Hameen v. Ferguson, 212 F.3d 226 (3d Cir. 2000), that the *de novo* standard applied because the Pennsylvania Supreme Court had not expressly addressed the merits of Petitioner's claim.

The Third Circuit has now made clear, however, that when a state court denies a claim on the merits but without discussion, the standard provided by 28 U.S.C. § 2254(d) applies. Chadwick v. Janecka, 2002 WL 1905136 (3d Cir. Aug. 20, 2002). On the other hand, the *de novo* standard applies when a state court denies a claim on the basis of a procedural default, for § 2254(d) applies only to a "claim that was adjudicated

on the merits in State court proceedings ...."[53] Thus, the standard of review to be applied by this Court depends on whether it finds that the Pennsylvania Supreme Court reviewed the merits of Petitioner's claim as part of its mandatory appellate review process, or whether it declined to review the merits on the basis of its (inadequate) procedural default ruling. Even under the 2254(d) standard of review, however, Banks commands that this Court grant relief. See *First Amended Petition* at 25; discussion infra.

With respect to the merits of the claim, the Commonwealth first utterly distorts the holding of the Supreme Court in Banks-3. *Response* at 106-07. The Commonwealth asserts that Banks-3 "directs" that the question in evaluating a Mills claim "is not whether the disputed [jury] instructions 'suggested' unanimity, or 'implied' unanimity, or 'allowed the jury to infer' unanimity, or 'could possibly be interpreted' to call for unanimity ... but whether unanimity as to the presence of mitigating factors was actually *required* so as to preclude individualized consideration of the

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[53] See, e.g., Smallwood v. Gibson, 191 F.3d 1257, 1264, 1269-70 (10th Cir. 1999) (reviewing claim de novo where state court denied claim on basis of procedural rule that was not "adequate"); Fisher v. Texas, 169 F.3d 295, 299-300 (5th Cir. 1999) (state court's reliance on state procedural ground to dismiss claims requires that claims be afforded de novo review in federal court); Moore v. Parke, 148 F.3d 705, 708-10 (7th Cir. 1998) (same); Liegakos v. Cooke, 106 F.3d 1381, 1385 (7th Cir. 1997) (same); Smith v. Smith, 166 F.3d 1215, 1998 WL 764761, *2 (6th Cir. Oct. 19, 1998) (unpublished disposition, text available on Westlaw) (claims de novo where state court denied them "on procedural grounds"). The Third Circuit cited Fisher with approval in Appel v. Horn, 250 F.3d 203, 210 (3d Cir. 2001), and Jermyn v. Horn, 266 F.3d 257, 280 n.8 (3d Cir. 2001).

mitigating evidence." *Response* at 106-07 (citing Banks-3, 122 S. Ct. at 2149) (emphasis original).[54] Banks-3, however, "directs" no such thing, and the Commonwealth's characterization of Banks-3 is utterly misleading, as a review of Banks-2 and Banks-3 shows conclusively.

In Banks-2, the Third Circuit addressed the petitioner's Mills claim as follows. Mr. Banks' direct appeal became final before Mills was decided. The Pennsylvania Supreme Court then decided the merits of Mr. Banks' claim in post-conviction proceedings after Mills was decided. The first issue for the Third Circuit was whether, in such circumstances, it was necessary to conduct a retroactivity analysis under Teague v. Lane, 489 U.S. 288 (1989). The Third Circuit found that it was not required to do so, Banks-2, 271 F.3d at 541-43, and proceeded to consider the merits of the claim. After a thorough review of the jury instructions and verdict slip in light of Mills and Boyde, the Third Circuit found that the instructions and verdict slip violated the Eighth Amendment, and that the Pennsylvania Supreme Court's decision to the contrary was an unreasonable application of Mills. Banks-2, 271 F.3d at 544-50.

The Commonwealth's petition for writ of certiorari was granted in part, and the Supreme Court, *per curiam*, reversed the Third Circuit's "determination that a *Teague* analysis was unnecessary." Banks-3, 112 S. Ct. at 2148. The Court clearly explained that

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[54] Other than the word "suggested," the words placed in quotations in the passage from the *Response* quoted above do not appear in Banks-3.

the *only* issue it was reviewing was the Third Circuit's failure to conduct a Teague analysis:

> [The Commonwealth] seek[s] a writ of certiorari, arguing that the Court of Appeals erred by not performing a *Teague* analysis, by applying *Mills* retroactively to respondent's case, and by concluding that the state court's decision was unreasonable under *Mills*. *We find it unnecessary to resolve the latter two of these claims*, because we determine that the Court of Appeals committed a clear error by failing to perform a *Teague* analysis.

Id. at 2150.

The Court then went on to explain that the Third Circuit's failure to conduct a Teague analysis was inconsistent with the Court's prior decision in Caspari v. Bohlen, 510 U.S. 383 (1994), which required federal courts to conduct a Teague analysis when the issue is properly raised by the government. Banks-3, 122 S. Ct. at 2150-51.

As the Court made crystal clear, *it did not address the merits of the petitioner's Mills claim*. Thus, the Court could not possibly have limited Mills error to situations in which the trial court "*requir[es]* juror unanimity as to the existence of mitigating factors," *Response* at 106, nor did it do so. In fact, there is not a single sentence in Banks-3 that can legitimately be construed as saying *anything* about the standard for evaluating Mills error. The Commonwealth's suggestion to the contrary is a figment of the imagination of counsel for the Commonwealth, to

which a citation to Banks-3 has misleadingly been attached.[55]

The standard remains that set forth in Mills and Boyde. Under that standard, Petitioner is entitled to relief, as explained by the Third Circuit in Frey and Banks-2.

The Commonwealth argues at length that Frey was wrongly decided. *Response* at 111-14. The Commonwealth's analysis is tendentious and inaccurate. Petitioner will not waste time refuting it, since Frey – besides being correctly decided – is obviously controlling in this Court.

With respect to the trial court's response to the jury question, the Commonwealth contends that the court's response alone did not violate Mills. *Response* at 115. The Commonwealth's argument is utterly out of context. The trial court's response clearly directed the jury to find – and therefore to weigh – only mitigating circumstances "that all of you had agreed upon." N.T. 11/16/83 at 155. It thus constituted the kind of express requirement of unanimity that the Commonwealth (wrongly) contends is required by Mills, making the

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[55] Mills has never been limited to situations in which the state court expressly requires juror unanimity. There was no such express requirement in Mills itself. Rather, Mills granted relief because there was "at least a *substantial risk* that the jury was misinformed," Mills, 486 U.S. at 381, into thinking there was a unanimity requirement. Indeed, the Boyde reasonable likelihood that the jury misapplied the instruction standard, cited by the Commonwealth, *Response* at 106, is flatly inconsistent with the Commonwealth's fictitious rendering of Banks-3.

Eighth Amendment violation far clearer in this case than in Mills itself, Frey or Banks.

Moreover, the trial court's improper response did *not* stand alone. Rather, it came after instructions identical to those found violative of Mills in Frey and Banks, and in the context of a verdict slip that likewise "runs afoul of the dictates of Mills." Banks-2, 271 F.3d at 550. In that context, the violation of the Eighth Amendment, and of Mills, Banks and Frey, is unmistakable. Petitioner is entitled to summary relief on this claim.

CLAIM II. THE NOTES OF TESTIMONY FROM THE SEVERANCE HEARING AND FROM TWO DAYS OF VOIR DIRE WERE NEVER TRANSCRIBED. AS A RESULT OF THE FAILURE TO PREPARE AND/OR PRESERVE THE TRANSCRIPTS, MR. KINDLER WAS DENIED HIS RIGHT TO A MEANINGFUL APPEAL OF HIS CONVICTIONS AND DEATH SENTENCE, AND ALL PRIOR COUNSEL WERE INEFFECTIVE FOR FAILING TO ENSURE THAT THERE WAS A COMPLETE RECORD FOR PREVIOUS PROCEEDINGS.

A. This Claim Was Exhausted on Direct Appeal as a Matter of Law; Alternatively, Exhaustion Would Now Be Futile and There is Cause and Prejudice for Any Default.

As discussed in Part II.C, supra, all record-based claims are exhausted as a result of Pennsylvania's mandatory appellate review in capital cases. As set

forth in the *First Amended Petition* at 25-37, the notes of testimony for two days of the voir dire proceedings and the hearing on the motion for severance were never transcribed. The lack of any such transcripts is apparent from even a minimal review of the record. Moreover, as explained therein, the lack of such transcripts deprived Mr. Kindler of a meaningful appeal of his conviction and death sentence, and of the effective assistance of appellate counsel. Since both the lack of the transcripts and the effect of attempting to appeal without transcripts were apparent on the face of the record, this is a claim that is exhausted by virtue of Pennsylvania's mandatory appellate review system.

Alternatively, should this Court erroneously find that the claim is not exhausted by operation of law, there is no question that it would now be futile for Petitioner to attempt to return to state court to exhaust this claim. Accordingly, the exhaustion requirement is excused.

Although a claim that is exhausted in this fashion is procedurally defaulted, the default may be overcome by a showing of "cause and prejudice." See, e.g., Whitney v. Horn, 280 F.3d 240, 252-53 (3d Cir. 2002). There is "cause" for a procedural default where the default results from the ineffective assistance of counsel in a proceeding in which the petitioner is entitled to effective assistance under the United States Constitution. Coleman v. Thompson, 501 U.S. 722, 750-52 (1991). Here, Petitioner has alleged that he was deprived of the effective assistance of appellate counsel. A defendant is entitled to the effective assistance of counsel on direct appeal under the

Fourteenth Amendment. Evitts v. Lucey, 469 U.S. 387 (1985).

Accordingly, here, as in Whitney, Petitioner's "cause and prejudice argument is intertwined with the merits of his ... claims." Whitney, 280 F.3d at 253. Review of the merits of Petitioner's claims will reveal that prior counsel's failure to raise these claims was deficient performance that prejudiced Petitioner, establishing cause and prejudice under Whitney. At a minimum, Petitioner is entitled to an evidentiary hearing on the merits and on cause and prejudice.

B. Petitioner is Entitled to Relief on the Merits.

The Commonwealth cites various decisions under the Court Reporter Act, 28 U.S.C. § 753(b), for the proposition that a habeas petitioner may not obtain relief based on the absence of a transcript without making an allegation of specific prejudice. *Response* at 121-23.

The decisions cited by the Commonwealth are distinguishable. In particular, all of the cited decisions are non-capital cases. In a capital case, meaningful appellate review is required by the Eighth Amendment; without meaningful review, the reliability of the death sentence would be prohibitively impaired. See, e.g., Parker v. Dugger, 498 U.S. 308 (1991); Clemons v. Mississippi, 494 U.S. 738 (1990). Because this is a capital case, the decisions cited by the Commonwealth are inapposite.

Moreover, Petitioner was represented by different counsel on appeal than at trial. See *Amended Petition*,

¶¶ 12-13. Even in United States v. Sierra, 981 F.2d 123 (3d Cir. 1992), cited by the Commonwealth, the Court recognized that as a "significant factor" with respect to the showing of prejudice. Id. at 126; cf. United States v. Selva, 559 F.2d 1303, 1306 (5th Cir. 1977) (presuming prejudice where transcripts were missing and new counsel appointed for appeal). A capital case in which new counsel appeared for the appeal, as here, is the strongest case for making a presumption of prejudice.

The Commonwealth virtually ignores Petitioner's claim that appellate counsel was ineffective. Counsel has an obligation to make sure that the record is complete and adequate for purposes of appellate review. See Sierra, 981 F.2d at 127 n.1. Counsel demonstrably did not satisfy that obligation here. Because counsel's failure constructively denied Petitioner the assistance of counsel with respect to any and all issues arising from the voir dire proceedings, Petitioner is not required to make a showing of prejudice resulting from counsel's deficient performance. See *First Amended Petition* at 33-36. Petitioner is entitled to relief.

CLAIM III. MR. KINDLER'S DEATH SENTENCE MUST BE VACATED BECAUSE THE "PROPORTIONALITY REVIEW" PERFORMED BY THE PENNSYLVANIA SUPREME COURT DID NOT PROVIDE HIM THE MEANINGFUL APPELLATE REVIEW MANDATED BY 42 PA. C.S. § 9711(H)(3)(III) AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

A. This Claim Was Exhausted on Direct Review by Operation of Law; Alternatively, Exhaustion is Excused Because There is No State Forum in Which Such a Claim Can Be Heard.

The Commonwealth contends that this claim is defaulted because it could have been, but was not, raised on direct review and/or in post-conviction proceedings. *Response* at 125-27. The Commonwealth is wrong on at least two counts.

First, the claim could not have been raised on direct review. Not only has the Pennsylvania Supreme Court said so, Commonwealth v. Gribble, 703 A.2d 426, 441 (Pa. 1997), it is self-evident that a claim that the Court has failed to follow the dictates of state law and due process in carrying out proportionality review is not ripe until the Court has in fact completed its review. While the claim is not ripe until after completion of direct review, the Court has also ruled that it is not cognizable in PCRA proceedings. Albrecht, 720 A.2d at 708. Accordingly, there is no state forum in which such a claim can be heard and thus the claim cannot be barred from federal review. Michel v. Louisiana, 350 U.S. 91, 93 (1955).

Second, if claims relating to proportionality review can be raised on direct appeal, then the claim is exhausted because the Court in fact conducted such review on direct appeal; the adequacy of such review is an issue that is exhausted automatically, by operation of state law. See Section II.C, *supra*.

The Commonwealth contends that the Pennsylvania Supreme Court has reviewed claims that

its proportionality review system violates due process. *Response* at 126-27. In fact, however, the opposite is true – the Court has declared its proportionality review system to be outside the dictates of due process or any other form of challenge or review.

In Commonwealth v. Banks, 656 A.2d 467 (Pa. 1995), the petitioner attempted to raise a challenge to the proportionality review procedure. The Court asserted that the petitioner had no due process rights with respect to proportionality review:

> [P]roportionality review is not an adversarial part of the trial or sentencing procedures in a death penalty case. Indeed, it is not even a sentencing proceeding at all. Rather, it is an appellate process designed to assure that a sentence of death in a particular case is not disproportionate to the penalty imposed in similar cases.

Id. at 474.

In Commonwealth v. Gribble, 703 A.2d 426 (Pa. 1997), the defendant attempted to raise a comprehensive challenge to the Court's proportionality review procedures, including its oft-stated reliance on (flawed, incomplete and inaccurate) data provided by the Administrative Office of Pennsylvania Courts (AOPC). The Court simply deflected this challenge by asserting that it relied on data provided directly to it by the President Judges, id. at 441 – data to which no capital defendant or petitioner has access, and with respect to which the appellant cannot be heard, in violation of due process. Gardner v. Florida, 430 U.S. 349, 362 (1977).

In Commonwealth v. Albrecht, 720 A.2d 693 (Pa. 1998), the petitioner brought a single claim alleging that the Court's proportionality review procedure was flawed, and that the petitioner's death sentence was disproportionate. The Court rejected the claim, stating: "This issue is now beyond the purview of the PCRA because it was previously litigated." Id. at 708. The Court thus indicated that such a claim can never be reviewed in PCRA proceedings, since it will always have been previously litigated as the result of the fact that the Court conducts proportionality review on direct appeal.[56]

The subsequent cases cited by the Commonwealth did nothing to remove the bar that was put in place by Albrecht. In Commonwealth v. Porter, 728 A.2d 890 (Pa. 1999), the Court reviewed a claim that prior counsel were ineffective for failing to challenge the proportionality review procedure. It denied the claim as foreclosed by Gribble. Porter, 728 A.2d at 901. In Commonwealth v. Chester, 733 A.2d 1242, 1258 (Pa. 1999), the Court held that any due process claim is foreclosed by the non-adversarial-process theory of Banks, supra. In Commonwealth v. Breakiron, 729 A.2d 1088, 1093 n.3 (Pa. 1999), as in Albrecht, the Court held that such a challenge is not cognizable in PCRA proceedings because it was previously litigated on direct appeal. See Pursell v. Horn, 187 F. Supp. 2d 260, 289-90 (W.D. Pa. 2002).

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[56] The Commonwealth's assertion, *Response* at 126, that the Albrecht ruling was limited to a subclaim that Mr. Albrecht's sentence was actually disproportionate is based on a patently unreasonable reading of Albrecht.

In sum, the Pennsylvania Supreme Court has held that a challenge to its proportionality review procedure is a) litigated on direct appeal, without having actually been raised on direct appeal, Albrecht, Breakiron; b) not cognizable because the proceedings are not adversarial, Banks, Chester; and c) without merit because the Court also considers other materials to which defendants and petitioners do not have access, Gribble, Porter. Other than the Court's mandatory direct review, there is thus no state forum in which a defendant can have his or her due process claim heard. Accordingly, to the extent (if any) that the claim was not exhausted by the mandatory direct review, it is exhausted because there is no available and/or effective corrective process in state court. 28 U.S.C. § 2254(b)(1)(B).[57]

B. Petitioner is Entitled to Relief on the Merits.

On the merits, Respondents' reliance on Riley v. Taylor, 277 F.3d 261, 310 (3d Cir. 2001), is misplaced because Riley is distinguishable. In Riley, the Delaware Supreme Court undertook a statutorily mandated proportionality review process. The Court examined twenty-one cases, including five in which the

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[57] The Commonwealth also contends that this due process claim is not "cognizable" in federal habeas proceedings. *Response* at 127-30. Even most of the decisions cited by the Commonwealth do not stand for this proposition; rather, they apply varying standards of review to various due process and other claims. The Commonwealth's "cognizability" argument is really a disguised merits argument. With respect to the merits of the claim, Petitioner relies on the discussion in the *First Amended Petition* and in Part B, infra.

death penalty was imposed. The Court explicitly identified the common characteristics among those cases which resulted in a death sentence, and concluded that Riley's death sentence was proportionate to the others. Id. Riley did not involve a challenge to the review process, did not challenge the accuracy of the data base, and made no claim of error other than asserting that the cases compared with his were not sufficiently similar. Id. at 311.

Petitioner's case is much different. Here, the Pennsylvania Supreme Court did not identify the comparison cases used in its proportionality review. The Court did not identify the similarities between Petitioner's case and those other cases resulting in a death sentence. Thus, Petitioner had no opportunity to examine, challenge or confront the Court's analysis. Moreover, Petitioner has alleged here that the proportionality data base is fundamentally flawed and inaccurate. It is filled with mistakes, mistakes which have been frequently called to the Pennsylvania Supreme Court's attention, yet which that Court has made no attempt to correct. In these circumstances, a proportionality review grounded in an identifiably flawed data base which the Court has consistently refused to review or correct, is a review done in bad faith. Petitioner does not simply ask this Court to look behind the mechanics of a single proportionality review, as Riley sought to do, but to examine a systemic problem that fundamentally distorts the review process. In these circumstances, Riley is not dispositive and Petitioner is entitled, at a minimum, to an evidentiary hearing on this claim.

CLAIM IV. JOSEPH KINDLER'S SENTENCE MUST BE VACATED BECAUSE OF INEFFECTIVE

ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL, WHICH VIOLATED HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.[58]

A. Counsel's Performance Was Deficient.

The Commonwealth starts from the premise that a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland v. Washington, 466 U.S. 668, 689 (1984), quoted in *Response* at 137.[59] While the premise is accurate, the Commonwealth then proceeds to ignore (a) what counsel has to say about the "circumstances of [his] conduct," and his "perspective at the time," and

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[58] The Commonwealth's procedural default contentions are meritless. For the reasons set forth at length in Part III, supra, there is no procedural bar ruling that would be "adequate" to preclude federal habeas review of the merits of this claim.

[59] Later, the Commonwealth misleadingly cites Strickland to support its bizarre and erroneous argument that an ineffectiveness claim requires a showing that counsel was so bad "that it was as if counsel had not been present at all." *Response* at 142. Obviously, Strickland does not require such a showing, which would approach the constructive denial of counsel altogether. See United States v. Cronic, 466 U.S. 648, 659 (1984) The Sixth Amendment requires more than the "mere physical presence of an attorney," Holloway v. Arkansas, 435 U.S. 475, 490 (1978); under Strickland, it requires that counsel provide professionally reasonable assistance. Strickland, 466 U.S. at 690.

(b) counsel's duty to investigate, as set forth, *inter alia*, in Strickland, 466 U.S. at 691, and Williams v. Taylor, 529 U.S. 362, 396 (2000). The Commonwealth's argument, however, fails to obscure the abundant evidence of counsel's deficient performance.

As the Supreme Court recently held in Williams, trial counsel in a capital case has an "obligation to conduct a thorough investigation of the defendant's background." Id. at 396. Thus, the starting point for analysis is *counsel's investigation* – the failure to conduct a professionally reasonable, thorough investigation of the defendant's background has a corrosive effect on counsel's conduct of the entire case. Indeed, counsel cannot make reasonable choices about what evidence to present or not to present unless counsel knows enough about the available evidence to make such choices. See Jackson v. Herring, 42 F.3d 1350, 1367 (11th Cir. 1995) (counsel's sentencing performance deficient where counsel "did not conduct enough investigation to formulate an accurate life profile of a defendant").[60]

Here, counsel has provided a sworn Declaration to the effect that he did *not* investigate for the purpose of presenting mitigating evidence at the penalty phase:

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[60] Accord Glenn v. Tate, 71 F.3d 1204, 1208 (6th Cir. 1995) (counsel must "systematic[ally]" investigate "their client's social history"); Antwine v. Delo, 54 F.3d 1357, 1367 (8th Cir. 1995) (counsel have "duty ... to collect as much information as possible about [defendant] for use at the penalty-phase"); Hill v. Lockhart, 28 F.3d 832, 845 (8th Cir. 1994) (same); Williamson v. Ward, 110 F.3d 1508, 1514 (10th Cir. 1997) ("in a capital case, counsel's duty to investigate all reasonable lines of defense is strictly observed").

I concentrated my efforts on attempting to create a reasonable doubt as to Mr. Kindler's guilt, although I was aware that there was a strong likelihood that Mr. Kindler would be convicted.

I did not conduct a penalty phase or mitigation investigation. In particular, I did not talk to Mr. Kindler or any of his family members about his family background. Mr. Kindler's family were available to me. His parents had retained me, and they attended the trial. I simply did not think about investigating or presenting evidence concerning family background at the penalty phase.

I also did not attempt to obtain any school, medical or other records relating to Mr. Kindler. I did not have any strategic or tactical reason for not seeking such records; it just did not occur to me that such records could be helpful.

I also did not consider obtaining any mental health evaluation of Mr. Kindler. Again, there was no strategic or tactical reason for my failure to do so.

Declaration of Daniel-Paul Alva, Esq., ¶¶ 3-6, Appendix J.

Although the Commonwealth would have this Court ignore what Mr. Alva says about his representation of Petitioner, in favor of what he "did in fact" at the penalty phase, *Response* at 142, the Commonwealth fails to explain how this Court can assess counsel's circumstances and perspective at the

time of the challenged conduct without considering what Mr. Alva has to say. Nor does the Commonwealth explain why what counsel "did in fact" does not include what counsel "did *not do* in fact" – i.e., conduct a mitigation investigation.

The Commonwealth's insistence on considering only the evidence counsel actually presented at penalty phase, *Response* at 142-47, results in its conclusion that counsel had to be effective because, after all, counsel did *something*. But that conclusion is fundamentally inconsistent with Williams.

In Williams, as here, counsel presented some mitigating evidence at the penalty phase. In particular, Mr. Williams' counsel presented evidence from the petitioner's mother, two neighbors and a psychiatrist, and brought out favorable evidence on cross-examination of government witnesses. This evidence tended to show that the petitioner was a "nice boy" and non-violent, that the petitioner had cooperated with the police in solving the murder, and that he had expressed remorse. Williams, 529 U.S. at 369, 398.

If the Commonwealth were correct, that would have been the end of the Williams case – counsel would be deemed effective because of what he "did in fact." But it was not the end of the case in Williams – or here. In Williams, the Court found that counsel's performance was deficient because of what counsel *did not do*: prepare for penalty phase more than a week before trial; investigate records that would have described Mr. Williams' "nightmarish childhood" of abuse and neglect; introduce available evidence of Mr. Williams'

cognitive deficits; or seek records documenting Mr. Williams' good conduct in prison. Id. at 395-96.

Here, too, there was much that professionally reasonable counsel would have done, but that Petitioner's trial counsel *did not do*: "conduct a penalty phase or mitigation investigation"; "talk to Mr. Kindler or any of his family members about his family background"; "think about" presenting family background evidence at the penalty phase; "attempt to obtain any school, medical or other records" concerning Mr. Kindler; or "consider obtaining any mental health evaluation of Mr. Kindler." Alva Decl., ¶¶ 4-6. Given those sworn statements of trial counsel, it makes no sense for the Commonwealth to suggest, *Response* at 144, that counsel actually made a reasonable strategic choice not to present the evidence to which the investigation that counsel *did not conduct* would have led.

For the reasons discussed herein and at greater length in the *First Amended Petition*, counsel's performance was deficient.

B. Petitioner Was Prejudiced by Counsel's Deficient Performance.

As discussed in the *First Amended Petition*, at 67-71, Petitioner was prejudiced by counsel's failure to investigate and present the powerful and extensive mitigating evidence discussed therein. In other words, it is reasonably likely that *at least one* juror would

have found the evidence sufficiently convincing to vote for a sentence of life rather than death.[61]

The Commonwealth's argument to the contrary focuses on the possibility that some of the proffered mitigating evidence could have been perceived as harmful to Petitioner, and the purportedly overwhelming nature of the aggravating evidence. *Response* at 148-49, 151-52. This argument is unavailing.

First, the mere possibility that some jurors could perceive some of the evidence that ineffective counsel failed to uncover as damaging does not negate prejudice. Williams, 529 U.S. at 396-98 (prejudice established where reasonably likely that the totality of the mitigating evidence would have "influenced the jury's appraisal of [petitioner's] moral culpability," even though "not all of the additional evidence was favorable to [petitioner].").

Second, the Commonwealth asserts that the facts that Petitioner worked for his father, and that his father attended the trial, are somehow contradictory of the proffered evidence that Petitioner's father was abusive. *Response* at 145, 148-49. The evidence that

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[61] In a state such as Pennsylvania, in which the jury has discretion to impose a life sentence if even a single juror is convinced by a preponderance of the evidence of the existence of even a single mitigating factor, the harmlessness inquiry focuses on the probable effect of the court's errors on a single juror. E.g., Frey v. Fulcomer, 974 F.2d 348, 368 (3d Cir. 1992) (prejudice means reasonable probability that "at least one juror would have decided differently and held out for a verdict of life imprisonment"); Jermyn v. Horn, 266 F.3d 257, 309 (3d Cir. 2001).

Petitioner's father was abusive does not mean that his father was an evil person. In fact, physically abusive parents typically themselves have experienced deprivation and abuse; have psychological and/or cognitive impairments; and/or are living in situations of extreme stress and social isolation. See J. Wiener, Textbook of Child & Adolescent Psychiatry, at 688-90 (2d ed. 1997). Similarly, the fact that Petitioner was abused does not necessarily mean that Petitioner would thereafter avoid his father -- many abused children are confused or ambivalent towards abusers, rather than avoidant; and many also blame themselves rather than their abusers. Id. at 690-91.

Third, the aggravating evidence was not actually so overwhelming as the Commonwealth suggests. As the Commonwealth notes, *Response* at 146, the jury rejected the "torture" aggravating circumstance, the most serious aggravator sought by the Commonwealth. Moreover, the mental health mitigating evidence – including the traumatizing effect of the abuse suffered by Petitioner, his mood disorder, his frontal lobe impairment, and his personality disorder – had the potential to weaken the aggravating factors, as well as establish mitigation. See Middleton v. Dugger, 849 F.2d 491, 495 (11th Cir. 1988).

Petitioner's claim is as strong, and in several respects stronger, than similar claims on the basis of which several District Courts in Pennsylvania recently granted relief. In so doing, these courts rejected the very types of assertions that the Commonwealth makes here. See, e.g., Laird v. Horn, 159 F. Supp. 2d 58 (E.D. Pa. 2001) (DuBois, J.); Holloway v. Horn, 161 F. Supp. 2d 452 (E.D. Pa. 2001) (Van Antwerpen, J.); Rompilla v. Horn, 2000 WL 964750 (E.D. Pa. 2000)

(Buckwalter, J.); Jacobs v. Horn, 129 F. Supp. 2d 390 (M.D. Pa. 2001) (Munley, J.); Pursell v. Horn, 187 F. Supp. 2d 260 (W.D. Pa. 2002) (Smith, C.J.); Jermyn v. Horn, 1998 WL 754567 (M.D. Pa. 1998) (Caldwell, J.), aff'd, 266 F.3d 257 (3rd Cir. 2001); Buehl v. Horn, 1996 WL 752959 (E.D. Pa. 1996) (Padova, J.).

C. Petitioner is Entitled to an Evidentiary Hearing on this Claim.

There is no question that Petitioner has alleged facts that, if proved, would entitle him to relief. When a habeas petitioner does that, he is entitled to a hearing on his claim. Townsend v. Sain, 372 U.S. 293, 312 (1963); Zilich v. Reid, 38 F.3d 317 (3d Cir. 1994) (evidentiary hearing required to allow district court to resolve disputed facts and make credibility determinations); Hakeem v. Beyer, 990 F.2d 750, 770 (3d Cir. 1993) (same); Smith v. Freeman, 892 F.2d 331, 337 (3d Cir. 1989) (same).

CLAIM V. JOSEPH KINDLER WAS DEPRIVED OF THE INDIVIDUALIZED SENTENCING DETERMINATION TO WHICH HE WAS ENTITLED UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AS A RESULT OF THE FACT THAT HIS PENALTY PHASE PROCEEDINGS WERE CONDUCTED JOINTLY WITH THOSE OF HIS CO-DEFENDANT, SCOTT SHAW. THE TRIAL COURT'S FAILURE TO SEVER MR. KINDLER'S PENALTY PHASE FROM THAT OF MR. SHAW VIOLATED MR. KINDLER'S RIGHTS UNDER THE SIXTH, EIGHTH, AND

FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The fact that Mr. Kindler's penalty phase was conducted jointly with that of Mr. Shaw was apparent on the face of the record, as were the Eighth Amendment implications of that fact. Accordingly, this claim was exhausted as part of Pennsylvania's mandatory appellate review procedure. See Part II.C, supra. Moreover, the claim was also exhausted in the post-conviction proceedings. Therefore, there has been no procedural ruling with respect to this claim that would be adequate to bar federal habeas review of the merits. Part III, supra.

The Commonwealth argues at length that joint trials are ordinarily permissible. *Response* at 157-62. While true, this is unresponsive to Petitioner's claim, which is that the trial court's failure to sever his penalty phase proceeding from that of Mr. Shaw, in the circumstances of this case, deprived him of his Eighth Amendment right to an individualized sentencing determination. Lockett v. Ohio, 438 U.S. 586, 605 (1978); Zant v. Stephens, 462 U.S. 862, 879 (1983).

The only case pertinent to Petitioner's actual claim that is cited by the Commonwealth is United States v. Tipton, 90 F.3d 861 (4th Cir. 1999). In Tipton, the court held that a sentencing court's discretion to conduct joint trials is "subject to constitutional constraints" under the Eighth Amendment requirement of individualized sentencing consideration. Id. at 892. The court further found that any possible inconvenience or unfairness to the Government from severing the trials was outweighed

by "the possibilities of unfairness to the accused persons from a joint penalty-phase trial – specifically the threat posed to individualized consideration of their situations, and in particular the quite different mitigating factors relevant to each." Id. The court ultimately rejected the claim only because of the trial court's repeated and specific instructions to the jury to give each defendant's sentence individualized consideration. Id. at 892-93.

The Commonwealth does not point to any such specific and repeated instructions in this case. Moreover, in this case the Commonwealth specifically and repeatedly made – and urged the jurors to make – a comparison of the relative culpability of Mr. Kindler and Mr. Shaw, in which Mr. Kindler's culpability was purportedly greater. N.T. 11/16/83 at 122-23, 141-43; see Claim VII, infra.[62] It is impossible to conceive of a greater "threat posed to individualized consideration of their situations," Tipton, supra, than this direct comparison made by the Commonwealth. The trial court took no action to undo the effect of this comparison, which amounted to a tacit endorsement of it.[63]

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[62] The Commonwealth asserts that in such a proceeding, "descriptions of the relative actions of each defendant were inevitable," *Response* at 179, and that it was proper for the prosecutor to tell the jury that Mr. Shaw was the "follower," while Petitioner was the "leader." Id.

[63] See Mann v. Dugger, 844 F.2d 1446, 1457 (11th Cir. 1988) ("When a trial court does not correct misleading [prosecutorial] comments ..., the state has violated the defendant's ... rights because the court has given the state's imprimatur to those comments; the effect is the same as if the trial court had actually instructed the jury that the prosecutor's comments represented a

The Commonwealth asserts that Petitioner must make a more specific showing of prejudice. That argument ignores the Eighth Amendment setting of this claim. In the context of capital sentencing, there is an increased need for reliability. Gregg v. Georgia, 428 U.S. 153, 206 (1976). As a result, procedures that carry an undue risk that the sentencing jury will not comply with fundamental Eighth Amendment norms are prohibited. See, e.g., Mills v. Maryland, 486 U.S. at 381 (unduly great risk that jury was misinformed as to unanimity requirement requires vacation of death sentence).

The joint penalty phase in this case, combined with the prosecution's "compare the culpability of the defendants" argument, resulted in just such an undue risk, one that the Eighth Amendment does not tolerate. Petitioner is entitled to relief.

CLAIM VI. JOSEPH KINDLER'S DEATH SENTENCE MUST BE VACATED BECAUSE OF PROSECUTORIAL MISCONDUCT DURING THE GUILT STAGE.[64]

The prosecutor went to considerable lengths in arguing to the jurors that if they found the defendants not guilty, the defendants could walk out the door and

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correct statement of the law.") (citing Tucker v. Kemp, 802 F.2d 1293, 1295 (11th Cir.1986) (en banc)).

[64] The Commonwealth's exhaustion and default arguments are meritless for the reasons discussed in Parts II and III, supra. Indeed, even the Commonwealth admits that Petitioner "presented the central elements" of this claim to the state courts in the direct appeal proceedings. *Response* at 164.

nothing could be done to "reverse that process," while if the jurors were to convict the defendants there would be "possibilities of appeal and reversal and those sorts of things." N.T. 11/14/83 at 102-03 (see text of entire passage in *First Amended Petition* at 78). Such remarks have consistently been condemned by American courts for at least eighty years. See *First Amended Petition* at 78-79 & n.38.

The Commonwealth's primary contention is that the prosecutor's improper argument was not bad enough to violate the due process standard of Donnelly v. DeChristoforo, 416 U.S. 637 (1974). This case, however, is much more like Caldwell v. Mississippi, 472 U.S. 320 (1985), than like Donnelly.

In Donnelly, the prosecutor stated: "'They (the respondent and his counsel) said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder.'" Donnelly, 416 U.S. at 640. The Court found that this remark did not rise to the level of a due process violation, for two main reasons. First, the trial court agreed that the remarks were improper and gave the jury "a strong curative instruction." Caldwell, 472 U.S. at 339 (citing and quoting Donnelly, 416 U.S. at 644). Second, the Court noted that the prosecutor's remark was "ambiguous," Donnelly, 416 U.S. at 645, and that it did not prejudice any of the defendant's specific rights. Id. at 643.

Caldwell and Petitioner's case are distinguishable. In Caldwell, the Court distinguished Donnelly on two grounds.

First, the trial court gave no curative instruction comparable to the one given in Donnelly. Caldwell, 472 U.S. at 339. The same is true here. The Commonwealth contends only that the remark was cured by general comments concerning closing argument made by the prosecutor and the trial court. *Response* at 167 (citing N.T. 11/14/83 at 106-07, 181-82). Such general comments are a far cry from the specific curative instruction given in Donnelly, and are insufficient to cure the error caused by the prosecutor's egregious comments. Mann v. Dugger, 844 F.2d 1446, 1457 (11th Cir. 1988).

Second, in Caldwell, the Court found that the remarks there (in contrast to those in Donnelly) were "focused, unambiguous and strong," and that they implicated the defendant's Eighth Amendment rights. Caldwell, 472 U.S. at 340. The prosecutor's comments here are much more like those in Caldwell than they are like the single passing sentence at issue in Donnelly. While the Commonwealth seeks to minimize the prosecutor's remarks, they went on for approximately a page of transcript, and hammered home the theme that a mistaken conviction can be cured, while a mistaken acquittal cannot be. The clear implication was that jurors in doubt about the right decision should convict (and sentence to death), with the assurance that any errors can be fixed on appeal. As in Caldwell, that type of argument implicates core Eighth Amendment concerns, as well as due process.

The prosecutor also told the jury that there were only four witnesses to the crime, and one of them – the victim – was dead. Besides appealing to the jurors' sympathy for the victim, this argument was also an improper comment on Mr. Kindler's assertion of his

right to remain silent. See, e.g., United States v. Cotnam, 88 F.3d 487, 499-500 (7th Cir. 1996) (prosecutor's comments during closing argument that evidence was "uncontroverted" were reversible error; because it was unlikely that anyone besides defendant could controvert the evidence, the argument indirectly commented on defendant's failure to testify).

The individual and cumulative effect of the prosecutor's misconduct entitles Petitioner to relief from his unlawful conviction and death sentence.

CLAIM VII. JOSEPH KINDLER'S DEATH SENTENCE MUST BE VACATED BECAUSE OF PROSECUTORIAL MISCONDUCT AT THE PENALTY PHASE.[65]

A. The Prosecutor Improperly Told the Jurors the "Position" of His Office With Respect to the Relative Culpability of Mr. Kindler and Mr. Shaw.

As discussed with respect to Claim V, supra, the joint penalty phase trial of Mr. Kindler with Mr. Shaw carried with it an impermissible risk that the jurors would be unable to give Mr. Kindler the individualized sentencing determination to which he was entitled under the Eighth Amendment. The prosecutor's argument made that risk a reality.

The prosecutor opened his closing argument by telling the jurors that it was the "position" of the

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[65] The Commonwealth's exhaustion and default arguments are meritless for the reasons discussed in Parts II and III, supra.

District Attorney's office that Mr. Kindler deserved death, but that Mr. Shaw was the less culpable of the two. See *First Amended Petition* at 84-85. The only conceivable purposes for telling the jurors what the prosecutor's office had concluded as to relative culpability were to suggest to the jurors that they, too, should consider the defendants' relative culpability, and that they should rely on the judgment as to relative culpability at which the prosecutor's office had arrived.

The prosecutor's argument, together with his explicit argument that Mr. Shaw was the "follower," while Mr. Kindler should be sentenced to death as the "leader," see N.T. 11/16/83 at 141-43; *First Amended Petition* at 87-89, completed the erosion of Petitioner's right to an individualized sentencing determination. It also constituted improper vouching for the reasons set forth in the *First Amended Petition* at 83-85.

B. The Prosecutor Improperly Told the Jurors That Return of a Death Verdict Against Mr. Kindler "Would Make Them Feel Good."

The Commonwealth contends that the prosecutor's "feel good afterwards" argument was simply a neutral statement that did not seek any particular result. This contention is belied by the record.

The "feel good afterwards" argument came at the end of the prosecutor's summation, which he began by informing the jury of the position of the prosecutor's office that death was warranted for Mr. Kindler under the law. He emphasized throughout that at least two aggravating circumstances were established by the

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facts and urged that those aggravating circumstances outweighed any potential mitigating circumstances. He reminded the jurors that they had all stated that they could impose the death penalty in an appropriate case. N.T. 11/16/83 at 144. He then made the following argument:

> I know it is tough, been here before and I know and I hear and when I understand that people that find things difficult, feel good afterwards for applying the law.
>
> For recognizing that their part, their position, their step, in the law enforcement process, was completed. They had done it ....

N.T. 11/16/83 at 145.

In that context, there is not the slightest doubt that when the prosecutor told the jurors that they – like other jurors he had talked to – would "feel good afterwards" for having "done it," what he was referring to was imposing the death penalty. Defense counsel so understood the prosecutor's argument, and objected after its close. N.T. 11/16/83 at 151. The prosecutor likened imposing the death penalty to the extraction of a painful tooth – it may hurt at the time, you may be anxious about it, but you will "feel good afterwards." That argument was improper.

C. The Prosecutor Improperly Referred to the Bible and Christian Values.

The Commonwealth contends that the prosecutor's references to the Bible and his own "Christian values" were permissible as an "invited response" to

arguments made by defense counsel. *Response* at 176-77. The Commonwealth misunderstands both the application and the effect of the "invited response" doctrine.

First, even where the "invited response" doctrine applies, it does not render the prosecutor's conduct appropriate. Even where defense counsel makes improper arguments, that does not give the prosecutor "license to make otherwise improper arguments," but may only be considered in determining whether "the prosecutor's 'invited response,' taken in context, unfairly prejudiced the defendant." United States v. Young, 470 U.S. 1, 12 (1985).

Second, the effect of the doctrine is that "if the prosecutor's remarks were 'invited,' and did no more than respond substantially in order to 'right the scale,'" id. at 12-13, such remarks in themselves will not ordinarily establish a due process violation.

Here, the invited response doctrine does not render the prosecutor's references to the Bible and "Christian values" harmless. There was nothing improper about defense counsel asking the jury to be merciful. In response, the prosecutor essentially told the jury that the death penalty was consistent with his personal "Christian values," implying it should be consistent with their values too. The response did not simply "right the scale," but improperly vouched for the propriety of the death sentence in light of the prosecutor's own "Christian values." Such a response to a plea for mercy goes far outside the "invited response" doctrine. Sandoval v. Calderon, 231 F.3d 1140, 1151-52 (9th Cir. 2000).

CLAIM X. PETITIONER IS ENTITLED TO RELIEF FROM HIS DEATH SENTENCE BECAUSE THE JURY WAS NOT INSTRUCTED THAT HE WOULD BE INELIGIBLE FOR PAROLE IF SENTENCED TO LIFE IMPRISONMENT.

A. This Claim Was Exhausted on Direct Appeal as a Matter of Law; Alternatively, Exhaustion Would Now Be Futile and There is Cause and Prejudice for Any Default.

As discussed in Part II.C, supra, all record-based claims are exhausted as a result of Pennsylvania's mandatory appellate review in capital cases. Because this is a record-based claim, it is so exhausted.[66]

Alternatively, should this Court erroneously find that the claim is not exhausted by operation of law, there is no question that it would now be futile for Petitioner to attempt to return to state court to exhaust this claim. Accordingly, the exhaustion requirement is excused. In addition, since the merits of the claim are intertwined with Petitioner's cause and prejudice arguments (based on the ineffective assistance of appellate counsel), Whitney, 280 F.3d at

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[66] The Commonwealth sneers at exhaustion by mandatory appellate review. *Response* at 197-98. Like most of the Commonwealth's bloated *Response*, this is pointless. Pennsylvania decided to adopt a system of mandatory appellate review in capital cases. Petitioner has described the effects of that system with respect to exhaustion, as confirmed by decisions of, *inter alia*, the Ninth Circuit and several district court decisions from this District. Part II.C, supra. The Commonwealth's gibes are irrelevant.

253, this Court should proceed to consider cause and prejudice together with the merits. Id. See Claim II.A, supra.

B. Petitioner's Conviction Became Final After *Simmons v. South Carolina* Was Decided.

The Commonwealth asserts that Petitioner cannot rely on Simmons v. South Carolina, 512 U.S. 154 (1994), contending that his conviction was final before Simmons was decided. The Commonwealth's defense is based on a complete misunderstanding of Teague, and is simply wrong.

A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed, or a timely filed petition has been denied. See Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987); Lambrix v. Singletary, 520 U.S. 518, 527 (1997). In Kindler-1, the Pennsylvania Supreme Court denied Petitioner's application for rehearing on April 8, 1994, and a petition for a writ of certiorari was timely filed. The United States Supreme Court ultimately denied Petitioner's petition for writ of certiorari on October 11, 1994. Kindler v. Pennsylvania, 513 U.S. 933 (1994).

Mr. Kindler's conviction and sentence therefore became final in October of 1994, well after Simmons was decided on June 17, 1994. Thus, Petitioner is entitled to rely on Simmons.

C. The Trial Court's Failure to Provide a Life Without Parole Instruction Violated

Petitioner's Due Process, Sixth Amendment and Eighth Amendment Rights.

The Commonwealth contends that Simmons does not apply to this case because the prosecutor supposedly had not placed Petitioner's future dangerousness at issue. *Response* at 200. Again, the Commonwealth is wrong. Under Simmons, future dangerousness is at issue whenever there is argument or evidence concerning future dangerousness. Simmons, 512 U.S. at 165. "Evidence of future dangerousness under Simmons is evidence with a tendency to prove dangerousness in the future." Kelly v. South Carolina, 122 S. Ct. 726, 732 (2002). Accordingly, when the prosecutor presents evidence or argument suggesting, e.g., that the defendant is a "bloody" "butcher," or a "'vicious predator,'" id. at 732-33 (quoting Simmons, 512 U.S. at 176 (O'Connor, J., concurring)), future dangerousness is at issue.

Under Simmons and Kelly, future dangerousness clearly was at issue in this case. As is described in the *First Amended Petition* (e.g., ¶¶ 248-249), the prosecution presented evidence of possible future dangerousness and the prosecutor argued future dangerousness. Petitioner's future dangerousness was at issue.

Next, the Commonwealth asserts that despite the imposition of a mandatory life sentence, a Pennsylvania prisoner convicted of first degree murder could conceivably receive a commutation, followed by parole. Based on this imaginable release, it contends that Petitioner would not have been entitled to a life without the possibility of parole instruction, "*because*

any such ... instruction would have misstated Commonwealth law." Response at 201. This is simply false. Pennsylvania law *requires* that an appropriate instruction be given when future dangerousness is at issue. E.g., Commonwealth v. May, 710 A.2d 44, 47 (Pa. 1998) ("a jury must be informed that life means life without the possibility of parole ... when the prosecutor injects considerations of the defendant's future dangerousness into the case"), citing Commonwealth v. Speight, 677 A.2d 317 (Pa. 1996). Respondents' version of Pennsylvania law is at odds with that of the Pennsylvania Supreme Court.

The Commonwealth's reliance on Scarbrough v. Johnson, 300 F.3d 302 (3d Cir. 2002) is misplaced. In Scarbrough, the defendant pled guilty to second degree murder after being informed that the conviction carried with it a *possibility* of parole. Id. at 303-04. The defendant was not given any assurances or estimates as to the likelihood of parole, id. at 305, unlike the defendant in Meyers v. Gillis, 142 F.3d 664 (3d Cir. 1998), where the court had found counsel ineffective for providing inaccurate information to the defendant concerning the possibility of parole. The Court concluded that under Pennsylvania law the *possibility* of parole from a life sentence does exist, and as a result, the information counsel provided Scarbrough regarding the *possibility* of parole did not render counsel ineffective. Id. at 307. Judge Nygaard dissented, contending that Scarbrough was not distinguishable from Meyers. Id. at 309-10.

Scarbrough is inapposite. Under Simmons, once Petitioner's future dangerousness was placed in issue – as it was – Petitioner was entitled to an *accurate* instruction concerning the meaning of a sentence of

life imprisonment. No such instruction was given. Simmons holds that the failure to give such an instruction violates due process. Whether counsel will be found ineffective for giving passively (as opposed to actively) misleading information concerning the possibility of parole, a Simmons violation is still a Simmons violation.

Thus, the Commonwealth's discussion concerning parole or commutation is irrelevant. The jury was never apprised about the ***rare*** possibility of parole or commutation. In fact, the possibility of commutation followed by parole is more theoretical than real. Commutation and parole can only be reached by a multi-step and rarely completed process. First, Pennsylvania's Board of Pardons must hold a "full hearing in open session, upon due public notice." Pa. Const., Art. IV, Sec. 9(a). Next, after such a hearing, the Board of Pardons must recommend by a majority vote that the prisoner's life sentence be commuted to a sentence of a term of years. Next, the Governor must accept the recommendation of the Board of Pardons and actually commute the life sentence to a sentence of a term of years. 71 P.S. § 299; Pa. Const., Art. IV, Sec. 9. After all of these steps have occurred, the prisoner, who then has a term-of-years sentence, becomes parole-eligible and may be paroled in the usual manner.

In addition to having many steps and requiring review by many parties who are subject to intense public scrutiny and political pressure, the above-described process has resulted in eventual release for prisoners convicted of first degree (intentional) murder only in extraordinarily rare circumstances. As of 1997 (and to the best of Petitioner's knowledge, as of today),

there has been only one person sentenced to life imprisonment for a first degree murder offense committed after the 1978 death penalty statute was passed whose sentence was commuted.

As Nelson Zullinger, Secretary of the Pennsylvania Board of Pardons, explains:

> Following a radical mastectomy in early 1983, Grace Evelyn Azzarella was diagnosed with progressive bone cancer ... Ms. Azzarella's attending physical certified that the cancer would cause her death within two years. On December 7, 1987, the Board of Pardons recommended that Ms. Azzarella's sentence be commuted so that she could "die with dignity." Ms. Azzarella's life sentence was commuted by Governor Casey on April 25, 1988 . . .
>
> Grace Evelyn Azzarella is the only person in Pennsylvania whose life sentence has ever been commuted for a first-degree murder which occurred after September 13, 1978 [the effective date of the statutory amendments].

Declaration/Affidavit of Nelson Zullinger, ¶¶ 9-10 (paragraph numbers omitted) (filed with the Third Circuit in Smith v. Horn, Nos. 96-9001, 96-9002).

Thus, there is no parole from a sentence of life imprisonment as a matter of law, and a life-sentenced prisoner can be released only after a multi-step, highly scrutinized, and extraordinarily rare process -- a process that, since the re-introduction of the death penalty, has resulted in only one (terminally ill) prisoner ever being released after being sentenced to

life imprisonment for first degree (intentional) murder. The Commonwealth's position that parole is "possible" is grossly misleading and simply unrealistic. The trial court's failure to properly instruct the jury on this issue violated Petitioner's Due Process, Eighth and Fourteenth Amendment rights as set forth in the *First Amended Petition*. Petitioner was prejudiced and is entitled to relief.

CONCLUSION

For all of the reasons submitted in Petitioner's prior submissions and herein, Petitioner respectfully requests that the Court grant the relief sought by the First Amended Petition for Writ of Habeas Corpus.

Respectfully submitted,

/s/

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DATED: December 17, 2002
Philadelphia, Pennsylvania

* * *

[CERTIFICATE OF SERVICE OMITTED IN PRINTING OF THIS APPENDIX]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 99-cv-0161

[Dated September 23, 2003]

JOSEPH J. KINDLER	)
	)
vs.	)
	)
MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; DONALD T. VAUGHN, Superintendent of the State Correctional Institution at Graterford, and JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview	)

MEMORANDUM AND ORDER

JOYNER, J. **September 23, 2003**

This case has been brought before this Court by Petition of Joseph J. Kindler for Writ of Habeas Corpus. For the reasons which follow, the petition shall be partially granted and leave given to the Commonwealth to conduct a new sentencing hearing.

History of the Case

This petition seeks relief on behalf of the petitioner from the sentence of death which was formally imposed upon him on October 2, 1991. That sentence was the result of Petitioner's November 15, 1983 conviction by a Philadelphia County Court of Common Pleas jury of the first degree murder, kidnaping and criminal conspiracy to murder 22-year-old David Bernstein on July 25, 1982.

Although Petitioner filed post-verdict motions, he escaped from custody on September 19, 1984, before those motions had been decided. The Commonwealth of Pennsylvania filed a petition to dismiss the post-verdict motions because Mr. Kindler was a fugitive from justice and that petition was granted, after hearing, on the grounds that Mr. Kindler's voluntary removal of himself from the court's jurisdiction operated as a waiver of whatever rights he may have had to have his post-verdict motions considered.

Petitioner remained a fugitive until April 26, 1985 when he was arrested in Quebec, Canada on criminal and immigration charges. Extradition was requested and granted by the Canadian Minister of Justice on January 17, 1986 but Petitioner sought to have that decision reviewed in the Canadian Courts. While that review was pending, Petitioner again escaped from the prison in Montreal, Canada where he was being held and remained at large for nearly another two years until he was again spotted and arrested in St. John, New Brunswick, following the broadcast of information about him on the television show, "America's Most Wanted." The Supreme Court of Canada thereafter

affirmed the decision of the Minister of Justice on September 26, 1991 and Petitioner was finally returned to Philadelphia later that day.[1] As noted,

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[1] As summarized by the Pennsylvania Supreme Court's opinions disposing of Petitioner's direct appeal of his conviction and sentence and the appeal of the denial of his petition under the Pennsylvania Post Conviction Relief Act, 42 Pa.C.S. § 9541, *et. seq.*, the evidence at trial supported the following recitation of the history of Mr. Kindler's crimes:

> On April 2, 1982, the Sound Odyssey store in Lower Moreland Township, Bucks County, was burglarized. A Lower Moreland Township patrol officer noticed a vehicle with its lights out pulling out of the cul-de-sac behind the Sound Odyssey at a high rate of speed and further noticed three persons inside the vehicle. Police were able to stop this vehicle, but the driver fled and was not apprehended. The two remaining passengers of this vehicle, Scott Shaw (Shaw), a sixteen-year-old juvenile and the victim, David Bernstein (Bernstein) were detained and arrested. While in police custody, Bernstein identified Appellant as the driver of the vehicle and further told the police that the burglary was Appellant's idea and that he would be willing to testify against Appellant and Shaw. This information was then conveyed to the Philadelphia Police since Appellant lived in Philadelphia, and the police secured a warrant for Appellant's arrest.
>
> The police executed the warrant by going to Appellant's home and, after a struggle, handed Appellant a copy of the warrant which clearly named Bernstein as the informant. Appellant was arrested and charged with the burglary of the Sound Odyssey, along with other theft-related offenses at other locations in three counties. Following a preliminary hearing, Appellant was held for court in Montgomery County for the Sound Odyssey theft and Appellant filed a motion to quash the charges against him, claiming that the evidence presented at the preliminary hearing was insufficient. A hearing was scheduled on this motion for July 23, 1982, and the

Montgomery County District Attorney's office obtained an order granting Bernstein immunity so that he could testify at this hearing. Bernstein's attorney informed Appellant's attorney that his client had been immunized for the July 23, 1982 hearing and that, if called to the stand, he would testify.

At the July 23, 1982 hearing, Bernstein appeared pursuant to the immunity order but Appellant did not appear, nor did his counsel and the motion to quash was dismissed with prejudice. Trial was set for August 17, 1982, and Bernstein, fearing that Appellant might try to prevent him from testifying, planned to move back home with his parents on July 25, 1983, according to testimony provided by the victim's mother.

Appellant complained to Shaw and Shaw's girlfriend, Michelle Raifer (Raifer) that he had to get rid of Bernstein because he would testify against him and discussed several plans with them for eliminating Bernstein, including drowning him in the Delaware River. On July 24, 1982, Appellant met with Raifer, who arranged to get her mother's car and to meet Appellant and Shaw. That evening the three met and drove the car to within a block of Bernstein's apartment. Raifer called Bernstein and established that he was home and Appellant instructed Raifer to leave and return to the apartment later in the evening with the car. At this time, Appellant placed an inner tube and flippers into the trunk of the automobile.

Appellant and Shaw then hid in a field near Bernstein's apartment to watch the door. Raifer returned between 2:30 and 2:45 a.m. on July 25, 1982 and Appellant, holding a black baseball bat, met her outside the apartment. Appellant told Raifer to ring the doorbell and to get Bernstein to come outside while Appellant, armed with his baseball bat, hid in the alleyway right next to the door to the apartment building.

Raifer did as she was instructed. Bernstein opened the door and had a conversation with Raifer and after some time Appellant pulled the door fully open, dragging out Bernstein

and began beating him over the head with the baseball bat approximately 20 times. Shaw also appeared on the scene and Appellant instructed him to hit Bernstein with an electric prod, which he did five times in the ribs. At this point Bernstein was rendered immobile and Appellant and Shaw dragged their victim to Raifer's waiting automobile, leaving a thirty-foot long trail of blood stains, and threw him into the trunk. Appellant and Shaw got into the car and drove with Bernstein still moaning in the trunk, for seven miles to a point on the River Road on the Delaware River. Appellant and Shaw then took Bernstein out of the trunk and as they began to throw Bernstein's body into the river, Appellant told Raifer to drive back to the main road and wait for them. Raifer drove off, but returned soon to find Appellant and Shaw emerging from the river. All three reentered the automobile and Appellant explained that Bernstein's body wouldn't sink so they had to fill his lungs with water and tie a cinder block around his neck to weigh the body down.

On the way back to Philadelphia, Raifer was instructed to stop the car so that Appellant could throw away the baseball bat, clothes and shoes he and Shaw had used during the murder. These items were tossed into various sewer inlets along Grant Street. The police later recovered the blood-stained baseball bat, shirt, pants and shoes that Appellant wore and Shaw's t-shirt and shoes. When the three returned to Appellant's home, they tried to wash the blood stains out of the trunk, using a Styrofoam ice chest and threw it and the trunk mat of Raifer's automobile into another sewer inlet. The pieces of broken ice chest and the trunk mat, the swimming suits that Appellant and Shaw were wearing, the inner tube, electric prod and a camouflage shirt that Appellant had worn were all later recovered from this sewer inlet by the police.

There was also testimony provided by one of Bernstein's neighbors (Craig Sattinsky) that he heard Bernstein being beaten and a car driving away and that when he came outside to investigate he saw Bernstein's apartment door open with Bernstein's girlfriend sitting there. By this time the girl was

Petitioner's formal sentencing took place on October 2, 1991, at which time he was sentenced to death on the murder conviction in addition to a consecutive ten to twenty years' imprisonment on the kidnaping conviction and a concurrent five to ten year sentence for criminal conspiracy. Petitioner then appealed to the Pennsylvania Supreme Court, which found: (1) that the trial court did not abuse its discretion in dismissing his post-trial motions and allegations of ineffective assistance of counsel as a response to his escape from custody and flight; (2) that sufficient evidence had been presented at trial to support the

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hysterical and corroborated Satinsky's suspicion that it was Bernstein that he heard being beaten and dragged off in an automobile. They both went out to the street and saw the trail of blood and Bernstein's girlfriend, Lisa Rothbarth, called the police giving them information which led them to look for Raifer's car. Within a few hours, the police intercepted Raifer at her home and seized the blood-soaked car. Raifer eventually confessed, identified Shaw and Appellant as Bernstein's murderers, and led the police to the various sewer inlets, where as already indicated, they retrieved the various items used in connection with the murder.

On July 26, 1982, at around 7:30 p.m., Bernstein's body surfaced in the Delaware River near River Road. The body had a cinder block tied to its neck. Multiple blows to the head were observed which were later shown by a medical examination to be consistent with blows from a bat and bruises were seen to the chest consistent with being made by the electric prod. The forensic medical examination also revealed that, prior to expiring, Bernstein ingested water and silt. The cause of death was identified as drowning and massive head injuries.

See: *Commonwealth v. Kindler*, 536 Pa. 228, 639 A.2d 1, 5 (1994) and *Commonwealth v. Kindler*, 554 Pa. 513, 514-518, 722 A.2d 143, 144-145 (1998).

first-degree murder conviction and a finding of at least one aggravating circumstance; (3) that the death sentence was not the product of passion, prejudice or any other arbitrary factor; and (4) that the sentence was not excessive or disproportionate to those imposed in similar cases. *Commonwealth v. Kindler*, 536 Pa. 228, 639 A.2d 1 (1994). Although Mr. Kindler subsequently filed a petition for a writ of certiorari to the United States Supreme Court, that petition was likewise denied on October 11, 1994.

On January 11, 1996, Petitioner sought relief by filing a petition under the Post Conviction Relief Act, 42 Pa.C.S. §9541, *et. seq.* ("PCRA"). In that petition, Mr. Kindler raised several issues including those previously raised on direct appeal to the Pennsylvania Supreme Court as well as several claims which essentially challenged the effectiveness of both his trial and his post-trial counsel. The Philadelphia County Court of Common Pleas again found that Petitioner had waived his right to raise these arguments when he escaped and fled the jurisdiction. It therefore denied and dismissed the PCRA application without a hearing on August 15, 1996 and Petitioner appealed to the Pennsylvania Supreme Court, which subsequently affirmed the decision of the Court of Common Pleas on December 11,1998.[2]

By way of the petition for writ of habeas corpus which he has filed in this Court, Petitioner asks that

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[2] The Supreme Court further denied Petitioner's request for reargument on March 15, 1999. *See: Commonwealth v. Kindler*, 554 Pa. 513, 722 A.2d 143 (1998).

this Court vacate his death sentence on the following grounds:

1. That he was sentenced by a jury that believed it could not return a verdict at the penalty phase without agreeing unanimously both as to individual mitigating circumstances and as to the proper ultimate penalty in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution.

2. That the "proportionality review" performed by the Pennsylvania Supreme Court did not provide him with the meaningful appellate review mandated by the Eighth and Fourteenth Amendments to the U.S. Constitution and 42 Pa.C.S. §9711 (H)(3)(III).

3. That his counsel at the penalty phase of his trial was ineffective in that he failed to develop and present available mitigating evidence on his behalf in violation of his rights under the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution.

4. That he was deprived of the individualized sentencing determination to which he was entitled under the Eighth and Fourteenth Amendments to the U.S. Constitution given that his penalty phase proceedings were conducted jointly with his co-defendant, Scott Shaw.

5. That prosecutorial misconduct during the guilt and penalty phase of the trial violated his rights to Due Process of Law.

6. That the jury failed to give effect to clear and uncontroverted evidence of mitigation in violation of his rights under the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution.

7. That the trial court gave a defective preponderance of the evidence instruction in violation of his rights under the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution.

8. That the sentencing jury was never instructed that if sentenced to life imprisonment, he would be statutorily ineligible for parole, in violation of his rights under the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution.

In addition, the Petition for Writ of Habeas Corpus seeks to have Mr. Kindler's conviction overturned because the notes of testimony from the severance hearing and from two days of the jury's voir dire were never transcribed and because of the cumulative prejudicial effect of all of the errors in this case. As a result of these failures, Petitioner contends that he was denied his right to meaningful appeal of his convictions and death sentence. Underscoring *all* of Petitioner's arguments is the assertion that to the extent that they failed to raise these arguments earlier, trial counsel and prior appellate counsel were ineffective.

Respondents at the outset assert that the petition for habeas relief must be dismissed as untimely filed and because Petitioner failed to first fairly present the claims which he seeks to raise here to the state courts. Accordingly, Respondents contend, Mr. Kindler has failed to procedurally exhaust his federal claims or

they are procedurally defaulted and now unreviewable. Alternatively, Respondents submit that all of Petitioner's claims are meritless. We shall first consider whether this petition has been timely filed.

Discussion

A. Timeliness of Filing of Petition for Writ of Habeas Corpus.

In this case, the petitioner filed his habeas petition on March 13, 2000, following this court's granting of his motion for appointment of counsel, stay of execution and motion to proceed *in forma pauperis* on February 9, 1999. Insofar as the Pennsylvania Supreme Court denied Mr. Kindler's PCRA petition on December 11, 1998, Respondents aver that the petition for habeas corpus must be stricken as out-of-time.

The provisions governing federal habeas corpus proceedings were extensively overhauled on April 24, 1996, when the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") took effect. Under §101 of that Act, 28 U.S.C. §2244(d):

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Although the Act did not specifically state as much, the Third Circuit has implied from the statute a one-year grace period for those petitioners whose convictions became final before the effective date of AEDPA such that those state prisoners had until April 23, 1997 to file habeas corpus petitions in the district courts. *Nara v. Frank*, 264 F.3d 310, 314-315 (3d Cir. 2001); *Burns v. Morton*, 134 F.3d 109, 111 (3d Cir. 1998).

Here, the Pennsylvania Supreme Court affirmed the petitioner's judgment of sentence on February 9,

1994 and denied his motion for re-argument on April 8, 1994. The U.S. Supreme Court denied certiorari on October 11, 1994. It is thus clear that Petitioner's conviction became final before AEDPA took effect.

Thereafter on January 11, 1996, Petitioner filed a petition for relief under Pennsylvania's Post Conviction Relief Act, 42 Pa.C.S. §9541, *et. seq.* The Philadelphia County Court of Common Pleas dismissed this petition without a hearing on April 15, 1996 and Petitioner then appealed to the Pennsylvania Supreme Court, which affirmed on December 11, 1998.[3] Petitioner moved for re-argument, which was denied on March 15, 1999. It thus appears that Mr. Kindler's PCRA petition was pending when AEDPA took effect on April 24, 1996 and that the one-year statute of limitations was tolled at least until December 11, 1998. The issue with which we are faced here is whether this statutory period was further tolled while the petitioner's motion for re-argument was pending before the Pennsylvania Supreme Court.

As noted under §2254(d)(2) [sic: §2244(d)(2)], ordinarily "the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation . . ." An application is considered to be "properly filed" when its delivery and acceptance are in compliance with the applicable laws and rules

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[3] The Pennsylvania Supreme Court has exclusive jurisdiction over appeals from final orders issued by the Courts of Common Pleas in those cases in which a sentence of death has been imposed. *See*: 42 Pa.C.S. §§722, 9711(h).

governing filings. *Artuz v. Bennett*, 531 U.S. 4, 8, 121 S.Ct. 361, 364, 148 L.Ed.2d 213 (2000). To properly apply this statute as a matter of federal law, we must look to state law governing when a petition for collateral relief is properly filed and the AEDPA requires that state law be interpreted as it would be in a diversity case by deferring to the state's highest court when it rules on an issue. *Fahy v. Horn*, 240 F.3d 239, 243-244 (3d Cir. 2001). This is because §2244(d)(2)'s "tolling rule is designed to protect the principles of comity, finality and federalism by promoting the exhaustion of state remedies while respecting the interest in the finality of state court judgments." *Brown v. Shannon*, No. 01-1308, 2003 U.S. App. LEXIS 4718 (3d Cir. March 17, 2003) at *17, quoting *Carey v. Saffold*, 536 U.S. 214, 122 S.Ct. 2134, 2139, 153 L.Ed.2d 260 (2002). Permitting petitions not recognized under state law and improperly filed as a matter of state law to toll the limitations period would not seem to promote exhaustion in the manner contemplated by the AEDPA. *Id.*

The Third Circuit has further noted that a flexible approach is to be employed in determining whether a motion is properly filed under §2244(d)(2), given that this section covers various forms of state review, including motions that do not fall directly under the PCRA but are nonetheless related to collateral review. *Nara v. Frank*, 264 F.3d 310, 315 (3d Cir. 2001); *Jones v. Morton*, 195 F.3d 153, 159 (3d Cir. 1999); *Douglas v. Beard*, Civ. A. No. 00-4935, 2002 U.S. Dist. LEXIS 6406, *8 (E.D.Pa. April 12, 2002). Of threshold importance is that the application be for a *state* remedy; indeed, the law is now clear that the limitations period will not be tolled during the pendency of a state prisoner's petition for writ of

certiorari to the U.S. Supreme Court or the pendency of a petition for writ of habeas corpus in the federal courts. *See, Duncan v. Walker*, 533 U.S. 167, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001); *Miller v. Dragovich*, 311 F.3d 574 (3d Cir. 2002); *Stokes v. The District Attorney of Philadelphia County*, 247 F.3d 539 (3d Cir. 2001). It *will* be tolled, however, during the time for seeking discretionary review in the state court system, so long as timely and properly filed. *See*: *Carey v. Saffold*, *supra*; *Phillips v. Vaughn*, No. 02-2109, 2003 U.S. App. LEXIS 1652, *4-5 (3d Cir. Jan. 29, 2003); *Swartz v. Meyers*, 204 F.3d 417, 418-422 (3d Cir. 2000); *Baker v. Horn*, 210 F.Supp.2d 592, 620 (E.D. Pa. 2002).

In this case, the record reflects that the Pennsylvania Supreme Court affirmed the dismissal of Petitioner's PCRA application on December 11, 1998 and that Petitioner then moved for reargument. While not a matter of right, applications for reargument are clearly permitted under the Pennsylvania Rules of Appellate Procedure, and must be filed within fourteen days after entry of the judgment or order involved and in conformity with the other requirements of Pa.R.A.P. Nos. 2541-2544. The parties here do not dispute that Mr. Kindler's application for reargument was timely and properly filed and it remained pending until the Pennsylvania Supreme Court denied it on March 15, 1999. We thus conclude that while discretionary, the petitioner's application for reargument did toll the statutory period for the filing of his habeas corpus petition in this court. Accordingly, Petitioner had until March 14, 2000 to file his habeas corpus petition under

the AEDPA and his March 13, 2000 filing was therefore timely.[4]

B. Exhaustion and/or Procedural Default of Petitioner's Claims.

Respondents next assert that the claims which Petitioner now advances are not reviewable by this Court as he failed, by escaping from custody and fleeing the Commonwealth of Pennsylvania, to give the state courts the opportunity to address and possibly correct the alleged constitutional errors in his conviction and sentencing. Consequently, those claims have been procedurally defaulted. Petitioner rejoins that all of his claims have been exhausted in that they or their substantial equivalents *were* presented to the Pennsylvania state courts for adjudication and by virtue of the requirement that the Pennsylvania

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[4] Petitioner alternatively argues that his petition for habeas relief should be deemed timely filed because this action was actually commenced by his filing a motion for appointment of counsel and stay of execution and that the one-year statute of limitations should be equitably tolled due to the Commonwealth's having filed an appeal from this Court's order granting the motion for stay of execution. While we do not expressly reach these issues because of our finding regarding statutory tolling, we would direct Petitioner's attention to the U.S. Supreme Court's very recent decision in *Woodford v. Garceau*, 123 S.Ct. 1398 (2003) in which the Court rejected the argument that a habeas action is commenced by the filing of a motion for appointment of counsel and held that a case does not become "pending" within the meaning of *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997) (holding that the amendments made under AEDPA to chapter 153 of Title 28, U.S.C. do not apply to cases "pending" in federal court on AEDPA's effective date) until an actual application for habeas corpus relief is filed in the federal court.

Supreme Court review the entire record in death penalty cases to ensure that the penalty of death was not imposed as the result of passion, prejudice or any other arbitrary factor. In addition, petitioner contends, the procedural default rules applied by the Pennsylvania state courts were not adequate to bar federal habeas merits review as of 1984, when he escaped from the Philadelphia Detention Center.

It has, of course, long been the settled rule that before a federal court may reach the merits of a claim in a timely filed §2254 petition, each claim must first have been exhausted in state court. *See*, 28 U.S.C. §2254(b)(1)(A); *Coleman v. Thompson*, 501 U.S. 722, 731-32, 111 S.Ct. 2546, 2555, 115 L.Ed.2d 640 (1991); *Baker v. Horn*, 210 F.Supp.2d 592, 625 (E.D.Pa. 2002). The exhaustion requirement ensures that state courts have the first opportunity to review federal constitutional challenges to state convictions and preserves the role of state courts in protecting federally guaranteed rights. *Caswell v. Ryan*, 953 F.2d 853, 857 (3d Cir. 1992), *cert. denied*, 504 U.S. 944, 112 S.Ct. 2283, 119 L.Ed.2d 208 (1992), citing *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct 1198, 71 L.Ed.2d 379 (1982).

To satisfy the exhaustion requirement, a petitioner must demonstrate that he "fairly presented" every claim in the federal petition to each level of the state courts, including the highest state court in which the petitioner was entitled to review. *Whitney v. Horn*, 280 F.3d 240, 250 (3d Cir. 2002); *Baker*, 210 F.Supp.2d at 625, citing *O'Sullivan v. Boerckel*, 526 U.S. 838, 845-848, 119 S.Ct. 1728, 1734, 144 L.Ed.2d 1 (1999). To "fairly present" a claim, a petitioner must present a federal claim's factual and legal substance to the

state courts in a manner that puts them on notice that a federal claim is being asserted. *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999). The state courts, however, need not reach the merits of a claim for it to be properly exhausted; exhaustion requires only that a federal habeas petitioner afford the state courts the *opportunity* to consider a claim on its merits. *Lambert v. Blackwell*, Civ. A. No. 01-CV-2511, 2003 WL 1718511 at *23 (E.D.Pa. April 1, 2003) and *Baker v. Horn, supra*, both citing *Castille v. Peoples*, 489 U.S. 346, 348-51, 109 S.Ct. 1056, 103 L.Ed.2d 380 (1989).

However, if a state's procedural rules bar a petitioner from seeking further relief in the state courts, the exhaustion requirement is satisfied because there is an absence of available State corrective process.[5] *Lines v. Larkin*, 208 F.3d 153, 160 (3d Cir. 2000), citing *McCandless*, 172 F.3d at 260, 28 U.S.C. §2254(b)(1)(B)(i). This is otherwise known as "procedural default" and it is said to occur when a prisoner's federal claim is barred from consideration in the state courts by an "independent and adequate" state procedural rule. *Carpenter v. Vaughn*, 296 F.3d 138, 146 (3d Cir. 2002). Even so, this does not mean that a federal court may, without more, proceed to the merits. Instead, claims deemed exhausted because of a state procedural bar may not be considered by the federal courts unless the petitioner establishes 'cause

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[5] Or, as sometimes occurs, it would be futile to require the presentation of the claims to the state court and hence the exhaustion requirement is excused and the claims would be subject to the doctrine of procedural default. *See, Wenger v. Frank*, 266 F.3d 218, 224 (3d Cir. 2001).

and prejudice' or a 'fundamental miscarriage of justice' to excuse the procedural default. *Id.*

"Cause" sufficient to excuse procedural default requires a showing that some objective factor, external to the defense, prevented compliance with state procedural rules. *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986). "Actual prejudice" occurs only if an error caused the "actual and substantial disadvantage" of the petitioner. *Riley v. Myers*, Civ. A. No. 01-6958, 2002 U.S. Dist. LEXIS 24404, *20 (E.D.Pa. Dec. 18, 2002), quoting *U.S. v. Frady*, 456 U.S. 152, 170, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1972). The burden of proof is on the petitioner to establish both cause for the default and resulting prejudice. *Id.*, citing *Teague v. Lane*, 489 U.S. 288, 298, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

Alternatively, if the petitioner establishes that the state procedural rule was not independent or adequate, the federal court may proceed to consider the merits of his claim. *See Generally*: *Gray v. Netherland*, 518 U.S. 152, 162, 116 S.Ct. 2074, 2080, 135 L.Ed.2d 457 (1996); *Harris v. Reed*, 489 U.S. 255, 262-263, 109 S.Ct. 1038, 1043, 103 L.Ed.2d 308 (1989); *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). A state rule provides an independent and adequate basis for precluding federal review of a state prisoner's habeas claims only if: (1) the state procedural rule speaks in unmistakable terms; (2) all state appellate courts refused to review the petitioner's claims on the merits; and (3) the state courts' refusal in this instance is consistent with other decisions. *Doctor v. Walters*, 96 F.3d 675, 683-684 (3d Cir. 1996); *Jones v. Lavan*, Civ. A. No. 02-2359, 2002 U.S. Dist. LEXIS 23715, *5 (E.D.Pa. Dec. 9, 2002). A

state procedural ground is not "adequate" unless the procedural rule is "strictly or regularly followed." *Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S.Ct. 1981, 1987, 100 L.Ed.2d 575 (1988); *Doctor v. Walters*, supra. *See Also*: *Ford v. Georgia*, 498 U.S. 411, 423-24, 111 S.Ct. 850, 857-58, 112 L.Ed.2d 935 (1991). Nevertheless, the Supreme Court has held that if a state supreme court faithfully has applied a procedural rule in "the vast majority" of cases, its willingness in a few cases to overlook the rule and address a claim on the merits does not mean that it does not apply the procedural rule regularly or consistently. *Banks v. Horn*, 126 F.3d 206, 211 (3d Cir. 1997), citing *Dugger v. Adams*, 489 U.S. 401, 410, n.6, 109 S.Ct. 1211, 1217, n.6, 103 L.Ed.2d 435 (1989). Accordingly, an occasional act of grace by a state court in excusing or disregarding a state procedural rule does not render the rule inadequate to procedurally bar advancing a habeas corpus claim in a district court. *Id. See Also*: *Cabrera v. Barbo*, 175 F.3d 307, 313 (3d Cir. 1999). Federal courts should generally determine questions of procedural default according to the habeas waiver law in effect at the time of the asserted waiver. *Doctor v. Walters*, 96 F.3d at 684, citing *Reynolds v. Ellingsworth*, 843 F.2d 712, 722 (3d Cir. 1988). *See Also*: *Jermyn v. Horn*, 266 F.3d 257, 278 (3d Cir. 2001); *Banks v. Horn*, 126 F.3d at 212-213; *Peterkin v. Horn*, 176 F.Supp.2d 342, 253-354 (E.D.Pa. 2001).

In this case, the record reflects that the trial court dismissed Mr. Kindler's post-trial motions by reason of his escape from custody and his then-current status as a fugitive from justice. Although it is not absolutely clear from the record, it appears that the trial judge based this decision on the "fugitive forfeiture rule" as articulated in *Commonwealth v. Passaro*, 504 Pa. 611,

476 A.2d 346 (1984). The Pennsylvania Supreme Court affirmed the trial court decision, concluding "that the action taken in dismissing the post-verdict motions was a reasonable response to Appellant's 'flouting' of the authority of the court . . ." *Commonwealth v. Kindler*, 536 Pa. 228, 639 A.2d 1, 3 (1994). In so holding, the Pennsylvania Supreme Court noted that it was charged with deciding whether the fugitive forfeiture rule, which was generally applicable to defendants who fled from justice during the *appellate* process, should likewise be applied to the petitioner, who fled while his *post-trial motions* were pending.

Subsequent to the Pennsylvania Supreme Court's decision affirming his conviction and sentence and the denial of his application for writ of certiorari to the U.S. Supreme Court, Mr. Kindler filed a petition under the Pennsylvania Post-Conviction Relief Act, 42 Pa.C.S. §9541, *et. seq.*, but the Philadelphia County Court of Common Pleas dismissed the petition for the same reason that it dismissed his post-verdict motions. The Pennsylvania Supreme Court affirmed this decision as well, noting that to be eligible for relief under the PCRA, the issues raised in the petition could not have been previously litigated. Reasoning that since Mr. Kindler had previously challenged the trial court's dismissal of his post-verdict motions because of his flight, the Supreme Court concluded that he could not obtain relief on this basis under the PCRA.

In considering the question of whether, as of September 20, 1984,[6] the fugitive forfeiture rule was one which the Pennsylvania courts have strictly and regularly followed and therefore whether it is independent and adequate, we are guided by the holding of the U.S. Court of Appeals for the Third Circuit in *Doctor v. Walters*, 96 F.3d 675 (3d Cir. 1996). In that case, the defendant escaped from custody during the luncheon recess of his criminal bench trial for aggravated assault and remained at large for five years. He was found guilty in absentia and, upon his return to custody, sought to appeal his conviction and sentence. The Pennsylvania Superior Court quashed the appeal pursuant to the fugitive forfeiture rule as articulated in Pa.R.A.P. 1972(6), the Pennsylvania Supreme Court affirmed and the U.S. Supreme Court denied certiorari. In evaluating whether the fugitive forfeiture rule was firmly established and regularly applied at the time that Doctor escaped in 1986, the Third Circuit conducted an exhaustive analysis of Pennsylvania Superior and Supreme Court cases applying the rule and found that as of that time,

> "Pennsylvania's fugitive forfeiture rule can be described as follows: if the defendant is returned to custody while his appeal is pending, an appellate court has the discretion to hear the appeal, but if the defendant is returned to custody after the appeal is dismissed, an appellate court lacks the discretion to reinstate and hear the appeal. . . . (citations and parenthetical references omitted) It is clear from these decisions, which reflect the state

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[6] This is the date on which the petitioner initially escaped from the Philadelphia Detention Center.

> of the law at the time of petitioner's escape, that Pennsylvania law afforded appellate courts different degrees of discretion depending on the posture of the appeal upon a former fugitive's return to custody. Pennsylvania law had never confronted the situation that arises in the instant case where petitioner's flight had ended and custody had been restored before the appellate process was ever initiated. Thus, it was not "firmly established" that Pennsylvania courts lacked the discretion to hear an appeal first filed after custody had been restored. Under the *Galloway* rationale, a court would have the discretion to hear an appeal filed by such a defendant because the defendant would be in custody during the entire pendency of his appeal and subject to the enforcement of any order entered as a result thereof. Furthermore, as the Superior Court noted in *Jones*, 564 A.2d at 985-86, it was unclear, until the Pennsylvania Supreme Court's decision in *Commonwealth v. Luckenbaugh*, 520 Pa. 75, 550 A.2d 1317 (1988), whether the *Passaro* forfeiture analysis even applied to a defendant who escaped and returned to custody during the pendency of his appeal. Therefore, the state courts in this case did not rely on an "adequate" procedural rule to deny petitioner a review of his appeal on the merits."

Doctor, 96 F.3d at 685-686. *See Also*: *Clark v. Commonwealth of Pennsylvania*, 892 F.2d 1142, 1149 (3d Cir. 1989). Given that Mr. Kindler also escaped and was returned to custody prior to the initiation of the appellate process (albeit during the pendency of his post-trial motions), we can find no reason to depart from the analysis of the *Doctor* court. Accordingly, we find that the fugitive forfeiture rule as applied in the

instant case does not provide an independent and adequate basis to preclude federal review of Petitioner's habeas claims and we shall therefore consider these claims.[7]

C. Applicable Standards to Habeas Corpus Petitions.

The principles for determining whether or not to grant a petition for a writ of habeas corpus to a state prisoner are stated at 28 U.S.C. § 2254(d):

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

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[7] We therefore do not reach the issues of whether there existed cause for the petitioner's default and resultant prejudice or whether the refusal to consider the merits of Mr. Kindler's claims would result in a miscarriage of justice.

Furthermore, "[i]n a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. §2254(e)(1).

The Supreme Court has noted that "clearly established Federal law" under §2254(d)(1) is the governing legal principle or principles set forth by it (the Supreme Court) at the time the state court renders its decision. *Lockyer v. Andrade*, ___ U.S. ___, 123 S.Ct. 1166, 1172 (2003), citing *Williams v. Taylor*, 529 U.S. 362, 405, 413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Bell v. Cone*, 535 U.S. 685, 698, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002). A state court's decision is "contrary to clearly established precedent" if the state court applies a rule that contradicts the governing law set forth in the Supreme Court's cases or if the state court confronts a set of facts that are materially indistinguishable from a decision of the Court and nevertheless arrives at a result different from that precedent. *Lockyer*, 123 S.Ct. at 1173; *Williams*, 529 U.S. at 405-406, 120 S.Ct. at 1523. Avoiding these pitfalls does not require citation of Supreme Court precedent; indeed, it does not even require awareness of it, so long as neither the reasoning nor the result of the state court decision contradicts it. *Early v. Packer*, ___ U.S. ___, 123 S.Ct. 362, 365 (2002). In this manner, an *unreasonable* application of federal law is different from an *incorrect* application of federal law. *Woodford v. Visciotti*, ___ U.S. ___, 123 S.Ct. 357, 360 (2002), quoting *Williams*, 529 U.S. at 410. Thus, to commence analysis under

the "contrary to" provision, the applicable Supreme Court precedent must first be identified and evaluated to determine whether it resolves the petitioner's claim. *Werts v. Vaughn*, 228 F.3d 178, 197 (3d Cir. 2000).

Second, under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from Supreme Court decisions but unreasonably applies that principle to the facts of the prisoner's case. *Lockyer*, 123 S.Ct. at 1174, citing *Williams*, 529 U.S. at 413. It is not enough that a federal habeas court, in its independent review of the legal question is left with a firm conviction that the state court was erroneous. *Id.*, at 1175. "Under §2254(d)(1)'s unreasonable application clause, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly." *Id.*, quoting *Williams*, 529 U.S. at 411. Rather, that application must be objectively unreasonable. *Id. See Also*: *Penry v. Johnson*, 532 U.S. 782, 792, 121 S.Ct. 1910, 1918, 150 L.Ed.2d 9 (2001).

Although the Supreme Court has yet to address the precise scope of Section 2254(d)(2), in at least two other cases in the Eastern District of Pennsylvania, that section has been interpreted to require a review of the record to determine whether, "in light of the evidence presented," the state court unreasonably determined the facts. *Lambert v. Blackwell*, Civ. A. No. 01-CV-02511, 2003 WL 1718511 at *28 (E.D.Pa.

April 1, 2003); *Abu-Jamal v. Horn*, 2001 WL 1609690 at *12 (E.D.Pa. Dec. 18, 2001).[8]

D. Petitioner's Claims.

1. Failure to Transcribe or Preserve the Notes of Testimony from the Severance Hearing and Two Days of Voir Dire.

Petitioner alleges that he was denied his right to a meaningful appeal of his convictions and death sentence as a result of the failure of his prior counsel and the Commonwealth to ensure that all of the notes of testimony relative to his trial were transcribed. In his case, Petitioner avers, not all of the notes of testimony from the severance hearing and the voir dire were transcribed.

It has long been held that in cases where a defendant is represented by a different attorney on appeal than at trial, he may be entitled to the entire transcript of the trial proceedings. *See, e.g., Hardy v. United States*, 375 U.S. 277, 279, 84 S.Ct. 424, 426, 11 L.Ed.2d 331 (1964). When a transcript is less than complete, the court must determine whether the alleged omissions or deficiencies justify a new trial. *United States v. Huggins*, 191 F.3d 532, 536 (1st Cir. 1999).

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[8] We are, of course, cognizant of the irony which arises here in that these principles are virtually impossible to apply in the instant case given the State courts' summary dismissal of Mr. Kindler's claims pursuant to his fugitive status.

In *Mayer v. City of Chicago*, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971), the Supreme Court held that "in all cases, the duty of the State is to provide the indigent [defendant] with as adequate and effective an appellate review as that given appellants with funds. . . . (citations omitted). In terms of a trial record, this means that the State must afford the indigent a record of sufficient completeness to permit proper consideration of his claims, [but] [a] record of sufficient completeness does not automatically translate into a complete verbatim transcript." 404 U.S. at 193-194, 92 S.Ct. at 414. *See Also*: *Simmons v. Beyer*, 44 F.3d 1160, 1168 (3d Cir. 1995). The *Mayer* Court went on to hold that a criminal defendant must first show a "colorable need" for a complete transcript, at which time the burden shifts to the state to show that something less will suffice. *Mayer*, 92 S.Ct. at 415. *See Also*: *Karabin v. Petsock*, 758 F.2d 966, 969 (3d Cir. 1985); *Sulecki v. Zimmerman*, Civ. A. No. 87-2663, 1988 U.S. Dist. LEXIS 6421 (E.D.Pa. June 30, 1988); *Ross v. Fulcomer*, Civ. A. No. 84-5774, 1986 U.S. Dist. LEXIS 30245, *6-*7 (E.D.Pa. Jan. 21, 1986). To warrant reversal, the defendant must further make a specific showing of prejudice as a result of the failure to produce the entire transcript. *United States v. Brand*, 80 F.3d 560, 563 (1st Cir. 1996); *United States v. Sierra*, 981 F.2d 123, 125 (3d Cir. 1992).

In this case, Petitioner argues only that he is entitled to have his capital habeas case reviewed upon a full record and that because there are no transcripts from two of the six days of voir dire of the jury and from one day's pre-trial proceedings on the defense's motion for severance, he has been denied the opportunity to raise possible errors in the jury selection process and to raise claims challenging the

fact that his capital sentencing proceedings were conducted with his co-defendant, Scott Shaw.

We do not find Petitioner's bald arguments to demonstrate either a colorable need for the missing transcripts or prejudice justifying reversal of his conviction. Indeed, in reviewing the transcripts from the four days of voir dire which were transcribed, we find no evidence whatsoever of any impropriety in those proceedings, nor does Petitioner cite us to any. Petitioner does not argue that the proceedings on the two non-transcribed days were conducted any differently, and this Court has no reason to believe that the trial court did anything differently. Similarly, there is a transcript from one day of the hearing on the severance motion, which includes the arguments of counsel and the ruling of the trial judge. A summary of the evidence produced with respect to the severance issue is contained therein, as are the reasons behind the trial judge's decision to deny the defense request to sever. Any error from these proceedings and from the judge's ruling may easily be gleaned from the existing transcript. Accordingly, we find that the record in this matter is sufficiently complete to permit proper consideration of the petitioner's claims in this case. For these reasons, Mr. Kindler's request that his conviction be overturned on this basis is denied.

2. Propriety of Jury Instructions on Aggravating and Mitigating Circumstances.

Petitioner next avers that the instructions given to the jury in the sentencing portion of his trial by the trial judge violated the Eighth and Fourteenth Amendments to the U.S. Constitution in that they led the jury to believe that it had to be unanimous in

finding any mitigating circumstances. In advancing this argument, Petitioner relies upon *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), in which the Supreme Court held that the Constitution prohibits a state from requiring jurors unanimously to agree that a particular mitigating circumstance exists before they may be permitted to consider that circumstance in their sentencing determination.

In *Mills*, the petitioner argued that Maryland's capital sentencing scheme, as explained to the jury by the court's instruction and as implemented by the verdict form, was unconstitutional because it conveyed to the jury the false impression that unanimity was required if any given mitigating circumstance was to be found to exist and thus considered by the jury panel in its sentencing determination. *See, e.g.*, 486 U.S. at 375-376, 108 S.Ct. at 1865-1866; *Abu-Jamal v. Horn*, 2001 WL 1609690 at *117. After examining the instructions and verdict form in that case, the Supreme Court agreed with Mills that there was:

> "a substantial probability that reasonable jurors, upon receiving the judge's instructions in this case and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance. Under our cases, the sentencer must be permitted to consider all mitigating evidence. The possibility that a single juror could block such consideration and

> consequently require the jury to impose the death penalty, is one we dare not risk."

108 S.Ct. at 1870.

Mills was decided in 1988, more than four years after Mr. Kindler was convicted of first degree murder, but some three years before he was returned to custody and formally sentenced to death. Not surprisingly, Respondents here argue that because *Mills* was not decided until long after Petitioner's jury conducted its penalty-phase deliberations, the trial judge could not have violated the unanimity preclusion principle established in that case during the trial in November, 1983. Respondents further point out that it would be both ironic and repugnant to apply *Mills* here in that it would effectively be a reward to Petitioner for his escapes from custody and having the Pennsylvania state courts summarily dismiss his post-verdict motions.

While we would certainly agree that Respondents' latter argument would seem to have some merit on its face, we are bound by the decision of the U.S. Court of Appeals for the Third Circuit in *Banks v. Horn*, 271 F.3d 527 (3d Cir. 2001), *rev'd in part*, 536 U.S. 266, 122 S.Ct. 2147, 153 L.Ed.2d 301 (2002), *reaffirmed on reconsideration*, 316 F.3d 228 (3d Cir. 2003) that *Mills* did not announce a new legal rule, despite the fact that it was decided after Petitioner's conviction and the dismissal of his post-trial motions and hence is properly retroactively applied.[9] In that case, the

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[9] Arguably, we need not conduct a retroactivity analysis in any event given that Petitioner's conviction did not become final until

petitioner had been convicted of having committed thirteen murders in Luzerne County, Pennsylvania in September, 1982 and was sentenced to death. His conviction and death sentence were upheld on direct appeal and on appeal for state post-conviction relief and Banks thereafter petitioned for a writ of habeas corpus in the U.S. District Court for the Middle District of Pennsylvania. This was denied and he appealed to the U.S. Court of Appeals for the Third Circuit, which reversed the District Court and granted the petitioner a provisional writ of habeas corpus. In so doing, the Third Circuit found merit to Banks' argument that the Pennsylvania state courts had unreasonably applied the holding in *Mills v. Maryland* in reviewing the jury instructions in his case and that his death sentence was unconstitutional. Although the Third Circuit initially did not deem it necessary to analyze whether *Mills* should have been retroactively applied because the Pennsylvania Supreme Court had applied it, the U.S. Supreme Court disagreed and remanded the case to the Circuit Court to conduct a retroactivity analysis under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). *See, e.g.*, *Horn v. Banks*, 122 S.Ct. at 2148. On remand, the Third Circuit: (1) found that *Mills* did not announce a new rule of constitutional law for retroactivity purposes[10] and thus was applicable on habeas review

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October 11, 1994 when the U.S. Supreme Court denied his petition for writ of certiorari on his direct appeal. *See, e.g., Gray v. Netherland*, 518 U.S. 152, 180, 116 S.Ct. 2074, 2089, 135 L.Ed.2d 457 (1996); *Abu-Jamal*, 2001 WL at *118.

[10] Thus, the Court effectively resolved for this Circuit "the close and difficult question upon which the circuits are split," [as to] "[w]hether *Teague* would bar retroactive application of *Mills*," on

of final state court decisions;[11] and (2) re-affirmed its earlier finding that the jury instructions and verdict form utilized in George Banks' death penalty trial were violative of *Mills*. *See*, *Banks v. Horn*, 316 F.3d at 229-230, 241-242.[12]

Given that Mr. Kindler's judgment of death was handed down only five months after Mr. Banks', we find that the principles articulated in the *Mills* case must likewise be applied to evaluate the jury instructions and verdict sheet used here.

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which it had "not previously taken a definitive position . . ." *See*: *Frey v. Fulcomer*, 132 F.3d 916, 920, n. 4 (3d Cir. 1997).

[11] In so holding, the Third Circuit noted that the *Mills* Court itself relied heavily on, *inter alia*, the earlier Supreme Court decisions in *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), which collectively held, in essence, that "in a capital case, 'the sentencer may not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death,'" and the "corollary that 'the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence. . . .'" *See*, *Banks*, 316 F.3d at 241.

[12] In 1990, the Supreme Court further clarified the legal standard for the review of jury instructions when the claim is that the instruction is ambiguous and open to an erroneous interpretation (as was the case in *Mills*). In *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990), the Court held that the proper standard in these cases is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Frey v. Fulcomer*, 132 F.3d at 921, quoting *Boyde*, 494 U.S. at 380, 110 S.Ct. at 1197-1198.

Indeed,"proper application of *Mills* requires at the outset that the reviewing court examine the entire jury instructions, posing the "critical question" whether a reasonable jury could have concluded from the instruction that unanimity was required to find a mitigating circumstance." *Banks*, 271 F.3d at 546. Thus, the court need not determine whether the jury did in fact understand the charge to require unanimity in consideration of mitigating evidence--only whether it was reasonably likely. *Banks*, 271 F.3d at 547, citing *Boyde*, 494 U.S. at 380, 110 S.Ct. at 1197-98 and *Mills*, 486 U.S. at 384, 108 S.Ct. at 1870.

In this case, the trial court issued the following instructions:

> Now, before the jury retires to consider the sentencing verdict, the court shall instruct the jury on the following matters: 1, the aggravating circumstances specified in subsection "D" as to which there is some evidence and you have them there. Then the mitigating circumstances specified in subsection "E" as to which there is some evidence.
>
> Now, the aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt. Mitigating circumstances must be proved by the defendant by a preponderance of the evidence. A preponderance of the evidence is somewhat less proof than is required for a reasonable doubt.
>
> Now, the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in that list, subsection "D" and no mitigating circumstances or

> if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances.
>
> The verdict must be a sentence of life imprisonment in all other cases. The court may in its discretion discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment. The court shall instruct the jury on any other matters that may be just and proper under the circumstances. . . .

(N.T. 11/16/83, 29-30, 152-153)[13]

A comparison of Mr. Kindler's instructions with those given to Mr. Bank's jury is instructive. In *Banks*, the instructions were as follows:

> Members of the jury, you must decide whether the defendant in this case is to be sentenced to death or to life imprisonment on each of the Informations upon which you have returned a verdict of guilty of murder in the first degree. The sentence you will impose will depend on your findings concerning aggravating and mitigating circumstances. The Crimes Code in this Commonwealth provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstances, or

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[13] Judge Geisz gave these instructions twice--first at the outset of the sentencing hearing and then again at the close of the hearing, after testimony and arguments of counsel had concluded.

> if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstance or circumstances.
>
> Remember, under the law of this Commonwealth, your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstance, or if you unanimously find one or more aggravating circumstances which then outweigh any mitigating circumstances.
>
> In all other cases, your verdict would be life imprisonment. Once again, the Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt. The defendant has the burden of proving mitigating circumstances by a preponderance of the evidence.
>
> If, after conscientious and thorough deliberations, you are unable to agree on your findings and your verdict, you should report that to me.

See, 271 F.3d at 546-547.

Following the procedure utilized in *Frey*, the Third Circuit examined the relevant portion, "you unanimously find at least one aggravating circumstance and no mitigating circumstance, or if you unanimously find at least one aggravating circumstance which then outweigh any mitigating circumstances . . .," and concluded that the instructions were in themselves ambiguous, allowing for a jury to infer that the requirement of unanimity applied both to aggravating and mitigating

circumstances. *Banks*, 271 F.3d at 548.[14] Further, reasoned the Court, the likelihood of confusion was heightened when the judge attempted to clarify the difference between aggravating and mitigating circumstances by explaining that the defendant had the burden of proving mitigating circumstances by a preponderance of the evidence but failed to mention that unanimity was not required for finding a mitigating circumstance. *Id.*

In the case at bar, while the instructions as a whole do not precisely mirror those given in *Frey* and *Banks*, the relevant portions do. Indeed, as in both *Banks* and *Frey*, the trial court instructed the sentencing jury that:

> "[T]he verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in that list, subsection "D" and no mitigating circumstances or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases."

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[14] The *Frey* Court examined instructions nearly identical to those given in *Banks* and found that when viewed in their entirety, those instructions "emphasize[d] the importance of a unanimous finding, using the phrase frequently and in close proximity to--within seven words of--the mitigating circumstances clause." Thus, reasoned the Court, "[c]onsidering this close proximity--the clause is, to the ear and to the mind, one sound bite--it is quite possible that a juror would, regardless of other qualifying language, believe that mitigating circumstances had to be found unanimously." *Frey*, 132 F.3d at 923.

and

> "the aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt. Mitigating circumstances must be proved by the defendant by a preponderance of the evidence. A preponderance of the evidence is somewhat less proof than is required for a reasonable doubt."

Again, the importance of a unanimous finding was discussed within very close proximity to the mitigating circumstances clause and there was no mention that unanimity was not required for a mitigating circumstance to be found. Hence, considering the instructions given here as a whole, we find that there is a "reasonable likelihood that the jury applied them in a manner that prevented the consideration of constitutionally relevant evidence." *Banks*, 271 F.3d at 549, quoting *Boyde*, 494 U.S. at 380, 110 S.Ct. 1190.

Moreover, we find that this error was only compounded by the verdict slip utilized in this case. Specifically, the verdict slip read as follows:

> We, the jury empaneled in the above entitled case, having heretofore determined that the defendant, is guilty of murder of the first degree, do hereby find:
>
> AGGRAVATING CIRCUMSTANCE(S)
>
> The victim was a fireman, peace officer, or public servant concerned in official detention who was killed in the performance of his duties ( )

The defendant paid or was paid by another person or had contracted to pay or be paid by another person or has conspired to pay or be paid by another person for the killing of the victim ( )

The victim was being held by the defendant for ransom or reward, or as a shield or hostage ( )

The death of the victim occurred while defendant was engaged in the hijacking of an aircraft ( )

The victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses ( )

The defendant committed a killing while in the perpetration of a felony ( )

In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense ( )

The offense was committed by means of torture( )

The defendant has a significant history of felony convictions involving the use or threat of violence to the person ( )

The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a

sentence of life imprisonment for any reason at the time of the commission of the offense ( )

MITIGATING CIRCUMSTANCE(S)

The defendant has no significant history of prior criminal convictions ( )

The defendant was under the influence of extreme mental or emotional disturbance ( )

The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired ( )

The age of the defendant at the time of the crime ( )

The defendant acted under extreme duress, although not such duress as to constitute a defense to prosecution under Section 309 (relating to duress), or acted under the substantial domination of another person ( )

The victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts ( )

The defendant's participation in the homicidal act was relatively minor ( )

Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense ( )

The aggravating circumstance(s) outweigh the mitigating circumstance(s)

YES ( ) NO ( )

We the jury render the following sentencing verdict:

DEATH ( )
LIFE IMPRISONMENT ( )

The jury found two aggravating circumstances to exist--that the victim was a prosecution witness to a felony committed by the defendant who was killed for the purpose of preventing his testimony and that the killing occurred while the defendant was perpetrating a felony. No mitigating circumstances were found. In reviewing the verdict slip, we note that nowhere does it make any distinction between either the different burdens of proof attendant to finding aggravating and mitigating circumstances or the different requirements for unanimity. We find that these omissions, when coupled with the instructions given, only enhance the likelihood that the jury undertook to consider the mitigating circumstances in this case using the same procedures by which it considered the aggravators. It is for this reason that we are compelled to grant the writ of habeas corpus and direct that petitioner either be given a new sentencing hearing or sentenced to life imprisonment.[15]

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[15] We note again Respondents' contention that this claim is not properly considered given that Petitioner has procedurally defaulted it by virtue of his escape from custody. While we stand by our earlier conclusion, as dictated by *Doctor v. Walters*, *supra*, that the fugitive forfeiture rule was not an independent and

3. Sufficiency of the "Proportionality Review" of Petitioner's Death Sentence.

Petitioner also seeks the vacation of his death sentence on the grounds that the "proportionality review" performed by the Pennsylvania Supreme Court did not provide him with the meaningful appellate review required by 42 Pa.C.S. §9711 and the Eighth and Fourteenth Amendments.

Contrary to Petitioner's assertion, the Eighth Amendment does *not* require that a comparative proportionality review be conducted in death penalty cases, even where a death-sentenced defendant requests one. *See, Pulley v. Harris*, 465 U.S. 37, 50-51, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). Although some courts have held that due process standards apply where state law provides for a proportionality review, it is unclear whether a state proportionality review statute creates any cognizable liberty interest for due process purposes under Third Circuit law. *See, Riley v. Taylor*, 277 F.3d 261, 311 (3d Cir. 2001); *Foster v. Delo*, 39 F.3d 873, 882 (8th Cir. 1994); *Sullivan v. Delaware*, Civ. A. No. 96-281-SLR,1998 U.S. Dist. LEXIS 6471 (D.Del. April 30, 1998); *Banks v. Horn*, 939 F.Supp. 1165, 1175 (M.D.Pa. 1996). In evaluating

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adequate basis for precluding federal review, we would also note our agreement with Judge Giles' reasoning and conclusion in *Yarris v. Horn*, 230 F.Supp.2d 577, 590-591 (E.D.Pa. 2002) that a *Mills* claim is a record-based claim which the Pennsylvania Supreme Court had the obligation to consider on its review of Petitioner's death sentence for proportionality and to ensure that it was not the product of passion, prejudice or any other arbitrary factor. Accordingly, we would also find that, as to this claim, Petitioner has exhausted his state court remedies.

a claim that a state court erred in conducting its proportionality review, a federal court may only inquire into whether the state court "undertook its proportionality review in good faith and found that the defendant's sentence was proportional to the sentences imposed in cases similar to his." *Riley, supra*, quoting *Walton v. Arizona*, 497 U.S. 639, 656, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), *rev'd on other grounds, Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). At the time of Petitioner's sentencing in 1991, 42 Pa.C.S. §9711(h)(3)(iii) read:

> The Supreme Court shall affirm the sentence of death unless it determines that:
>
> > (iii) "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant."[16]

Here, the Pennsylvania Supreme Court did conduct its mandated review of the record in Mr. Kindler's case to ascertain whether sufficient evidence was presented at trial to support his first degree murder conviction and the finding of at least one aggravating circumstance and whether the death sentence was the product of passion, prejudice or any other arbitrary factor or was excessive or disproportionate to the penalty imposed in similar cases. *See Generally*: *Commonwealth v. Kindler*, 536 Pa. 228, 639 A.2d 1, 4 (1994). In addition to finding that there was indeed sufficient evidence to

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[16] Section 9711(h)(3)(iii) was abolished by statute dated June 25, 1997.

support the jury's findings of guilt and aggravating circumstances to justify imposition of the death penalty, the Supreme Court concluded:

> We have studied this record and conclude that the sentence of death, being mandated, is neither excessive nor disproportionate to the penalty imposed in similar cases. *See, Commonwealth v. Frey*, 504 Pa. 428, 475 A.2d 700 (1984), *cert. denied*, 469 U.S. 963, 105 S.Ct. 360, 83 L.Ed.2d 296 (1984) (and Appendix attached thereto).
>
> Finally, after our review of this record, we conclude that the sentence of death was a product of the evidence and not a product of "passion, prejudice or any other arbitrary factor." 42 Pa.C.S. §9711(h)(3).

Kindler, 639 A.2d at 7.

Petitioner contends that in conducting the proportionality review in his case, the Pennsylvania Supreme Court presumably relied upon the database compiled and maintained by the Administrative Office of the Pennsylvania Courts of all cases in which a first degree murder conviction is obtained. However, Petitioner asserts, the database is flawed in that it has no means by which to include information about those cases where a defendant has pled guilty, where the jury is hung, or cases where a prosecutor chooses not to go forward with a first degree murder prosecution nor does it collect and compare information on aggravating circumstances found with mitigators found. According to Mr. Kindler, the database is impermissibly "skewed toward death" because it cannot perform any sort of qualitative analysis.

While Petitioner may well be correct in his assertion that the AOPC database was flawed and that the system for conducting proportionality review in Pennsylvania was less than perfect, we nevertheless cannot find any requirement that such review be flawlessly conducted, even assuming that it gives rise to a liberty interest. Petitioner has offered no evidence or argument to suggest that the Supreme Court conducted its review in bad faith. Indeed, where the state law furnishes sufficient guidelines to the sentencer, there is a presumption that the death sentence was not wantonly and freakishly imposed and thus that the sentence is not disproportionate within any recognized meaning of the Eighth Amendment. *Sullivan v. Delaware*, and *Banks v. Horn*, both *supra* and quoting *Walton v. Arizona*, 497 U.S. at 655-56 and *McCleskey v. Kemp*, 481 U.S. 279, 306, 308, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). Because there is no federal constitutional right to proportionality review, if the federal court finds that the review was undertaken in good faith, it cannot look behind the state court's conclusion of proportionality to consider whether the state court misapplied state proportionality law. *Riley v. Taylor*, 277 F.3d at 311-312.

Thus, as proportionality review is not constitutionally required and Petitioner has not presented any evidence to suggest that the Pennsylvania Supreme Court did not conduct its review in good faith, we cannot grant Petitioner habeas relief on this basis. *See Also*: *Laird v. Horn*, 159 F.Supp.2d 58, 124-125 (E.D.Pa. 2001).

4. Sufficiency of Petitioner's Trial Counsel's Performance at the Penalty Phase of Trial.

Mr. Kindler next submits that his sentence should be vacated because his trial counsel was constitutionally ineffective in failing to investigate his family background and upbringing and failing to have his mental health evaluated. Petitioner avers that had his attorney done so, he would have uncovered mitigating evidence that could have been presented to the jury in the sentencing phase of his trial.

The U.S. Supreme Court has long recognized that the right to counsel under the Sixth Amendment and the Due Process clauses is crucial to protect the fundamental constitutional guarantee of a fair trial. *See*: *Strickland v. Washington*, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984). A fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding and the right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. *Id.*, quoting *Adams v. United States ex. rel. McCann*, 317 U.S. 269, 275, 63 S.Ct. 236, 240, 87 L.Ed. 268 (1942) and *Powell v. Alabama*, 287 U.S. 45, 68-69, 53 S.Ct. 55, 63-64, 77 L.Ed. 158 (1932). Of course, the right to counsel means the right to the *effective* assistance of counsel. *United States v. Cronic*, 466 U.S. 648, 654, 104 S.Ct. 2039, 2044, 80 L.Ed.2d 657 (1984).

It is now well-established that the standard governing the evaluation of ineffective assistance of counsel claims is that of reasonably effective assistance. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. Thus, when a convicted defendant complains of the ineffectiveness of counsel's assistance he must first show that counsel's performance was deficient, i.e., that counsel made errors so serious that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1511, 146 L.Ed.2d 389 (2000); *Berryman v. Morton*, 100 F.3d 1089, 1094 (3d Cir. 1996).[17]

Second, the defendant must show that the deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2064. In order to establish prejudice, a defendant need not demonstrate that the outcome of the proceeding would have been different, but only that there is a "reasonable probability" that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Marshall v. Hendricks*, 307 F.3d 36, 85 (3d Cir. 2002). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Woodford v. Visciotti*, 537 U.S. 19, 123 S.Ct. 357, 359, 154 L.Ed.2d 279, 285 (2002); *Lambert v. Blackwell*, *supra*, 2003 WL 1718511 at *33.

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[17] Stated otherwise, it must be shown that counsel's performance was so deficient that it fell below an objective standard of reasonableness under prevailing professional norms. *Darden v. Wainwright*, 477 U.S. 168, 184, 106 S.Ct. 2464, 2473, 91 L.Ed.2d 144 (1986); *Buehl v. Vaughn*, 166 F.3d 163, 169 (3d Cir. 1999), citing *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2064.

Finally, in evaluating counsel's performance, reviewing courts must be "highly deferential" to counsel's reasonable strategic decisions and guard against the temptation to engage in hindsight. *Marshall*, 307 F.3d at 85, quoting *Strickland*, 466 U.S. at 689-90, 104 S.Ct. at 2065. There is a strong presumption that, under the circumstances, counsel's challenged actions might be considered sound strategy. Buehl, 166 F.3d at 169. Thus, the court is not engaging in a prophylactic exercise to guarantee each defendant a perfect trial with optimally proficient counsel, but rather to guarantee each defendant a fair trial, with constitutionally competent counsel. *Marshall*, 307 F.3d at 85. In order to assess an effectiveness claim properly, the court "must consider the totality of the evidence before the judge or jury." *Id.*, quoting *Strickland*, 466 U.S. at 695.

Of course, the Supreme Court has long recognized the importance which mitigating evidence plays in ensuring that a capital trial is at once consistent and principled but also humane and sensible to the uniqueness of the individual. *See*: *Eddings v. Oklahoma*, 455 U.S. at 110-111, 102 S.Ct. at 874-875, and *Lockett v. Ohio*, 438 U.S. at 604-605, 98 S.Ct. at 2964-2965. The Court has further held that the Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. *Peterkin v. Horn*, 176 F.Supp.2d at 378, citing, *inter alia*, *Penry v. Lynaugh*, 492 U.S. 302, 317, 109 S.Ct. 2934, 2946, 106 L.Ed.2d 256 (1989), *Johnson v. Texas*, 509 U.S. 350, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993).

In the case at hand, five friends of Joseph Kindler and his family testified at the sentencing portion of Petitioner's trial. While each witness testified slightly differently, the gist of all of their testimony was that Mr. Kindler was a good, hardworking, kind person who could still do some good for society even from behind bars particularly in view of his unique skills and talents with electronics. Each witness asked that the jury impose a sentence of life imprisonment, rather than death. Petitioner, however, does not take exception to the admission of this evidence (which was clearly mitigating in nature) but rather contends that his counsel did not go far enough in his preparation for the sentencing portion of his trial.

Indeed, according to the affidavit of Daniel Paul Alva, Esquire, Petitioner's trial counsel, Petitioner's case was the first capital case he had ever tried and he did not conduct a penalty phase or mitigation investigation simply because it never occurred to him to do so. He thus did not interview Petitioner or any of his family members about Petitioner's upbringing, educational or medical histories nor did he endeavor to obtain any psychological or mental health evaluation of his client. Having now reviewed the affidavits and reports provided to him by Mr. Kindler's present counsel, Mr. Alva acknowledges that he would have learned that Petitioner was raised in a violent, chaotic and abusive home, that his mother had a drinking problem, that he had suffered two head injuries (neither of which resulted in hospitalization), and that he was suffering from mood and personality disorders. Mr. Alva avers that he would have presented this evidence to the jury had he known about it, and that its non-presentation was due only to his ignorance and not to any strategy on his part.

As *Strickland* makes clear,

> ". . . strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."

466 U.S. at 690-691, 104 S.Ct. 2066. Given Mr. Alva's admission that he neither undertook any investigation nor made a strategic decision that such investigation was unnecessary, we are compelled to find that, in this regard, his representation fell below an objective standard of reasonableness. *See Also*: *Wiggins v. Smith*, ___ U.S. ___, ___ S.Ct. ___, No. 02-311, 2003 U.S. LEXIS 5014 at *42-43 (S.Ct. June 26, 2003); *Williams v. Taylor*, 529 U.S. at 390-391; 120 S.Ct. at 1511.

However, to merit relief, Petitioner must also show prejudice, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Bell v. Cone*, 535 U.S. 685, 122 S.Ct. 1843, 1850, 152 L.Ed.2d 914 (2002), quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2052. A reasonable probability is a probability

sufficient to undermine confidence in the outcome. *Williams*, 120 S.Ct. at 1512.

Although prejudice may be presumed in certain Sixth Amendment contexts (such as actual or constructive denial of assistance of counsel altogether or various kinds of state interference with counsel's assistance), in most cases a case-by-case analysis will be necessary with the defendant bearing the burden of affirmatively proving prejudice. *See*, *Williams*, 120 S.Ct. at 1512 and *Strickland*, 104 S.Ct. at 2067. In this regard, the Third Circuit has held that *Strickland* requires an analysis based on a complete record and that the prejudice test mandates that once the areas where counsel was found to be ineffective are identified, the redefined presentation must be measured against the reasonably probable outcome in a given case. *Marshall v. Hendricks*, 307 F.3d at 115. In the penalty phase of a capital case, this involves a delicate process whereby the reviewing court re-weighs the aggravating and mitigating factors with all of the corrections taken into account. *Id.*

In application of these principles, we cannot find that a sufficient showing has been made that the outcome of the penalty phase of Petitioner's trial would have been different. Here, the mitigating evidence at issue relates to Mr. Kindler's mental and emotional health and make-up. To give rise to a mitigating circumstance in this case, the evidence would have to demonstrate that "the defendant was under the influence of extreme mental or emotional disturbance," that "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired," or fall within the parameters of mitigation evidence

"concerning the character and record of the defendant and the circumstances of his offense." According to the reports from the psychologist and psychiatrist who evaluated Petitioner, he suffers from "mild impairment in manual praxis due to motor preservation and delayed verbal recall, moderate impairment in speed of visual tracking and moderate to severe impairment in tests of speed of set shifting and logical deductive reasoning," along with "Mood Disorder" and "Narcissistic Personality Disorder." As psychiatrist Robert Fox further opined,

> "[p]eople with a history of trauma like that Mr. Kindler experienced and people with frontal lobe impairment frequently have poor impulse control, poor judgment, and poor emotional control. In Mr. Kindler's case, these impairments are combined with his underlying personality traits of grandiosity. Moreover, when his mood is hypomanic, the tendency toward hypomania and poorly thought out, risk taking behavior is intensified. It is my opinion to a reasonable degree of psychiatric certainty that the combination of these impairments in Mr. Kindler's case constitutes an extreme mental or emotional disturbance."

This evidence then, could have been sufficient to establish the mitigating factor of extreme mental or emotional disturbance. In weighing this evidence against the aggravating factors, however, we do not believe that the jury could have determined that this mitigating factor adequately outweighed the two aggravating factors found (that the murder was committed to prevent the victim from testifying against the petitioner in a felony matter and that it was committed while in the course of the perpetration

of another felony). In any event, while this is a very close question, we find that this evidence is insufficient to undermine confidence in the outcome of the sentencing verdict. So saying, the petition will be denied on this basis.

5. Constitutional Propriety of Conducting the Sentencing Portion of Petitioner's Trial with his Co-Defendant.

Mr. Kindler next asserts that his constitutional rights under the Eighth and Fourteenth Amendments were further violated by the conduct of the sentencing portion of his trial with his co-defendant, Scott Shaw, and by the prosecutor's arguing to the jury that Petitioner should be sentenced to death but Shaw should not.

It is true that there is a general requirement of individualized sentencing and a more specific requirement under the Eighth and Fourteenth Amendments that there be an individualized consideration of mitigating factors in capital cases. *See*: *Stringer v. Black*, 503 U.S. 222, 231, 112 S.Ct. 1130, 1137, 117 L.Ed.2d 367, 380 (1992); *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978). Indeed, what is important at the stage of the proceedings in which the jury chooses between life or death, is an individualized determination on the basis of the character of the individual and the circumstances of the crime. *Zant v. Stephens*, 462 U.S. 862, 879, 103 S.Ct. 2733, 2743-44, 77 L.Ed.2d 235, 251 (1983), citing, *inter alia*, *Eddings v. Oklahoma*, 455 U.S. at 110-112 and *Lockett*, 438 U.S. at 601-605.

The U.S. Supreme Court has noted that "improper joinder does not, by itself, violate the Constitution. Rather, misjoinder would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." *Laird v. Horn*, 159 F.Supp.2d 58, 96 (E.D.Pa. 2001), quoting *United States v. Lane*, 474 U.S. 438, 446, n.8, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986). Generally speaking then, the decision on whether or not to grant a motion for severance rests within the sound discretion of the trial court and a criminal defendant has no constitutional right to severance unless there is a strong showing of prejudice caused by the joint trial. *United States v. Hart*, 273 F.3d 363, 370 (3d Cir. 2001); *U.S. v. Console*, 13 F.3d 641, 655 (3d Cir. 1993); *Laird*, 159 F.Supp.2d at 96, citing, *inter alia*, *Cummings v. Evans*, 161 F.3d 610, 619 (10th Cir. 1998). *See Also*: *Zafiro v. United States*, 506 U.S. 534, 538-540, 113 S.Ct. 933, 938, 122 L.Ed.2d 317 (1993); *Commonwealth v. Marinelli*, 547 Pa. 294, 690 A.2d 203, 212-213 (1997), *cert. denied*, 523 U.S. 1024, 118 S.Ct. 1309, 140 L.Ed.2d 473 (1998); Pa.R.Crim.P. Nos. 582, 583. It should be noted that mutually antagonistic defenses are not prejudicial *per se*; the fact that hostility exists between the defendants or that one defendant may try to save himself at the expense of the other constitutes insufficient grounds to require severance. *Zafiro*, 506 U.S. at 538, 113 S.Ct. at 938; *Marinelli*, 690 A.2d at 213.

In this case, Petitioner argues that the trial court's denial of his severance motion enabled the Commonwealth to contrast him with Mr. Shaw, use Mr. Shaw's mitigating evidence as an improper aggravating factor against him and portray him as especially deserving of the death penalty. He does not

dispute that he and Mr. Shaw were charged with conspiring to and murdering Mr. Bernstein nor does he allege that the crux of either his or Mr. Shaw's defense was that the other committed the offenses charged while maintaining his own innocence. Thus, Mr. Kindler and Mr. Shaw did not have mutually antagonistic or mutually exclusive defenses. In view of this and since the trial court had no knowledge of what the prosecutor would argue at the time it decided the severance motion, we thus cannot find any error in the trial court's refusal to sever the trials of Messrs. Kindler and Shaw.

However, Petitioner also takes exception to the prosecutor's arguing to the jurors that they should find mitigation as to Mr. Shaw. In so doing, Petitioner submits, the prosecutor improperly introduced a non-statutory aggravator and effectively told the jury that there was no available mitigation as to him. The objected-to comments are as follows:

> "I did not state and argue emphatically in reference to Mister Shaw. There has been testimony that you heard that Mister Shaw was in fact led. You have heard testimony from his grandmother, as a matter of fact, that he in fact got into trouble because he was led as a result of older people, because of the failure perhaps at times to have sufficient male companionship among other things.
>
> If that were the case and you must accept that does not lessen in terms of guilt of a crime indeed not as you had found.
>
> But you must consider in reverse what and where that puts the individual that organized and

effectuated this particular act, for we then could find that that man has not only forever ruined the life of an individual so that he is dead but ruined the life of another individual because of his influence, intensity, clarity of purpose and methods in detail, tragically, meticulous moments and I again refer you to that knot. That is what we are talking about. If you believed that Mister Shaw in fact was led, if you believe that he, as a, at the time, 16 year old boy, who was under the influence of older people and if you believe that either indirectly or whatever, there was a certain amount of coercion, although not sufficient to negate the crime, if you would accept that, well yes, you could find of course mitigating circumstances in that.

So also you must consider, however, even there the aggravating circumstances that I had mentioned. That's up to you to decide. But in reference to Mister Kindler, it's an entirely different story. Because with that we are talking about, a leader, the actor, the one with the idea, the one with the motive, the one with the push throughout, the one who directed the disposal of the material, the one that came back and said he's not dead yet; I had to use a concrete stone to drop him in the river. Ladies and gentlemen, that alone. We are talking about weighing, we are talking about weighing of circumstances to see where the aggravating and the mitigating would apply and how they would stand, how they in fact would be in reference to weighing each other."

(N.T. 11/16/83, 141-143).

Although we find no error in the trial court's initial decision to permit Messrs. Kindler and Shaw to be tried together, we are constrained to find that, by making the preceding arguments, the prosecutor effectively created antagonism between Mr. Kindler and Mr. Shaw's defenses in this case and thereby crossed the constitutional line. It is particularly interesting to note that it was the prosecutor, not Mr. Shaw's attorney, who elicited much of Mr. Shaw's mitigating evidence when he cross-examined Mr. Shaw's grandmother and in fact, Mr. McGill argued this mitigating evidence nearly as forcefully as did Mr. Shaw's own counsel. (N.T. 11/16/83, 57-59). The Supreme Court has held that because the use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty, the death sentence may have to be invalidated unless it is sufficiently supported by other valid, aggravating factors and the weighing process has otherwise been unaffected. *See*, *Stringer v. Black*, 503 U.S. 22[illegible] 235-236, 112 S.Ct. 1130, 1139, 117 L.Ed.2d 367 (199[illegible], and *Zant v. Stephens*, 462 U.S. 862, 879, 103 S.Ct. 2733, 2744, 77 L.Ed.2d 235 (1983). By eliciting this mitigating evidence on behalf of Mr. Shaw and making the preceding argument, we find that Mr. McGill introduced an invalid, vague, aggravating factor against Mr. Kindler, *to wit*, being the "lead" actor in the crime. As we have previously concluded that Petitioner's death sentence must be overturned on other grounds, it is not otherwise supported in this case and we would therefore vacate it on the basis of this error as well.

6. The propriety of the prosecutor's arguments at the guilt and sentencing phases of the trial.

Petitioner next asserts that the prosecutor engaged in misconduct at both the guilt and penalty phases of his trial by: (1) telling the jury in his guilt phase closing argument that an acquittal would be final but a guilty verdict could be appealed; (2) telling the jurors that there were only four witnesses to Mr. Bernstein's murder and that of those witnesses Mr. Bernstein was dead and could not testify; (3) telling the jury in his sentencing phase closing argument that it was the "position" of his office that Petitioner should be put to death but Mr. Shaw sentenced to life imprisonment, (4) telling the jurors that giving Petitioner the death penalty would "make them feel good;" and (5) making impermissible references to the Bible.

It is well settled that a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone. *United States v. Young*, 470 U.S. 1, 11, 105 S.Ct. 1038, 1044, 84 L.Ed.2d 1 (1985). Indeed, a petitioner will not succeed merely because the prosecutor's actions "were undesirable or even universally condemned." *Young v. Vaughn*, Civ. A. No. 00-3512, 2001 U.S. Dist. LEXIS 23403 at *13 (E.D.Pa. Nov. 20, 2001), quoting *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). The appropriate standard of review on habeas corpus of a claim of prosecutorial misconduct is the narrow one of due process and not the broad exercise of supervisory power. *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986), quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974). The relevant question is whether the prosecutors'

comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.*; *United States v. Miles*, No. 00-4201, 53 Fed. Appx. 622, 2002 U.S. App. LEXIS 25221 (3d Cir. Nov. 12, 2002) at *22. Thus, habeas relief is not available simply because the prosecutor's remarks were undesirable or even universally condemned. *Darden*, 477 U.S. at 180-181; *Donnelly*, 416 U.S. at 643; *Chun Choi Lam v. Kelchner*, 304 F.3d 256, 271 (3d Cir. 2002). Finally, the arguments of counsel must be judged in the context in which they were made, bearing in mind that arguments of counsel carry less weight with a jury than do instructions from the court. *Boyde v. California*, 494 U.S. 370, 384, 110 S.Ct. 1190, 1200, 108 L.Ed.2d 316, 331-332 (1990).

In his closing argument at the guilt phase of the petitioner's trial, the prosecutor prefaced his challenged remarks by discussing the importance of the jury's job:

> "I contrast that with the very important right that all of us have that you right now are in the midst of exercising. And that is the right of the jury to indeed become part of the law enforcement process. The right of the jury to make a decision based on the law that we are all governed by and make immediate and definite to a degree the action that would follow.
>
> By that I mean whereas at times we may wonder, speculate about what will happen in the future, all of you, the 12 of you, when you do reach a verdict, a result will indeed occur."

He then went on to say:

"Just as if you would find the defendants not guilty, they would be right in reference to this case to stand up and just leave and never again think about this particular point because they're left, they're gone and there's nothing I can do, the judge or anybody present to in any way reverse that process.

That, ladies and gentlemen, is the power that all of you have. That's immense. That's awesome and most important. You also have the power, if you were to convict, to in fact render a judgment on facts in accordance with the law with the result occurring, that is, a conviction and of course, there is--where there are convictions, possibilities of appeal and reversal and those sorts of things which are strictly legal procedural things, that may be true.

However, to a certain measure, if you should find them guilty, it would be final. But there is no question if they were found not guilty, it would be final."

(N.T. 11/14/83, pp. 102-103).

Petitioner cites *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) as support for his contention that these remarks constituted misconduct mandating reversal. *Caldwell*, however, held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328-329, 105 S.Ct. at 2639. In *Caldwell*, the

prosecutor asserted in his closing argument at the sentencing portion of the defendant's trial that he was

> ". . . in complete disagreement with the approach the defense has taken. I don't think it's fair. I think it's unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know--they know that your decision is not the final decision. My God, how unfair can that be? Your job is reviewable. They know it. Yet they . . . Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said 'Thou shalt not kill.' If that applies to him, it applies to you, insinuating that your decision is the final decision and they're gonna take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For as they know, as I know and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically, and I think it's unfair and I don't mind telling them so."

472 U.S. at 325-326, 105 S.Ct. at 2637-2638.

While the argument made in *Caldwell* bears some similarities to that made here, the prosecutor in Mr. Kindler's case made his remarks during his closing in the *guilt-innocence* phase of the trial--not at sentencing. Indeed, the Supreme Court has subsequently read *Caldwell* as "relevant only to certain types of comment--those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Porter v. Horn*, Civ. A. No. 99-2677, 2003 U.S. Dist. LEXIS 11352, *226-227

(E.D.Pa. June 26, 2003), quoting *Darden v. Wainwright*, 477 U.S. 168, 183, n. 15, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). *See Also*, *Romano v. Oklahoma*, 512 U.S. 1, 9, 114 S.Ct. 2004, 2009-2010, 129 L.Ed.2d 1 (1994). We therefore do not find *Caldwell* dispositive.

Furthermore, prosecutorial misconduct does not always warrant the granting of a new trial. *United States v. Zehrbach*, 47 F.3d 1252, 1265 (3d Cir. 1995). To be sure, the Supreme Court has acknowledged that given "the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial." *Id.*, quoting *United States v. Hasting*, 461 U.S. 499, 508-09, 103 S.Ct. 1974, 1980, 76 L.Ed.2d 96 (1983). For these reasons, the Supreme Court has held that an appellate court should not exercise "its supervisory power to reverse a conviction when the error to which it is addressed is harmless since, by definition, the conviction would have been obtained notwithstanding the asserted error." *Id.*

The harmless error doctrine requires that the court consider an error in light of the record as a whole, but the standard of review depends on whether the error was constitutional or non-constitutional. *United States v. Gambone*, 314 F.3d 163, 177 (3d Cir. 2002). Non-constitutional error is harmless when it is highly probable that the error did not contribute to the judgment. High probability, in turn, requires that the court possess a sure conviction that the error did not prejudice the defendant. *Id.*, citing *Zehrboch*, 47 F.3d at 1265. If the error was constitutional, the court may affirm only if the error is harmless beyond a

reasonable doubt. *Id.*, citing *United States v. Molina-Guevara*, 96 F.3d 698, 703 (3d Cir. 1996).

Turning now to an examination of the prosecutor's remarks in context, we find that while they were indeed undesirable, they did not so infect the trial with unfairness as to deny petitioner his rights to due process of law. Shortly after the closing arguments, the trial judge instructed the jury that:

> ". . . Your duty is to find the facts independently from the evidence and from the evidence alone. Neither the opinion of the district attorney, nor counsel for the defense, nor the opinion of this court, that is, myself, as the trial judge, nor our interpretation of the evidence is binding on you. You will be careful not to be influenced by any opinion that may filter into your minds through this charge of the court. Similarly, opinions expressed by counsel should not draw you to your conclusions unless supported by evidence and the inference properly drawn therefrom. . ."

(N.T. 11/14/83, 181-182). The judge did not instruct the jury that a guilty verdict was not final and could be appealed nor did he instruct the jury that a not guilty verdict could not be appealed. Thus, reviewing the prosecutor's comments in the context of the whole and being mindful that counsel's remarks are given less weight than a trial court's instructions and of the overwhelming evidence of the petitioner's guilt presented at the trial, we conclude that the prosecutor's remarks, while admittedly improper, do not rise to the level of a constitutional violation and constituted harmless error at most.

We reach a similar conclusion with respect to the prosecutor's comments regarding the decedent's inability to testify. The objected-to remarks are as follows:

> ". . . Ladies and Gentlemen, let it be known that often cases we do in our situations, deal necessarily with codefendants. It is clear from you that from what you see perhaps that isn't someone to like, someone to empathize with, someone to care. Someone perhaps to detest. But that again is not your particular role. In many cases, you will hear from codefendants and particularly in homicide cases for the obvious reasons. In this particular crime, what we have, the time of that brutal murder, we have 4 people involved. One person cannot possibly testify, since he's dead. Other 2 individuals who are living are defendants and the other defendant is a witness. There was simply from what you have heard and from the evidence presented, no one else present. . . ."

(N.T. 11/14/83, 108-109).

Mr. Kindler argues that these remarks were intended to and had the effect of inflaming and unfairly prejudicing the jury against him and was also a comment on his right to remain silent at his trial. Certainly, it is true that because of the surpassing importance of the jury's penalty determination a prosecutor has a heightened duty to refrain from conduct designed to inflame the jury's passions and prejudices. However, in reviewing these remarks in context, it is clear that they were not unduly prejudicial, but were rather an appropriate response to the defense arguments regarding the testimony of the

prosecution's chief witness, Michelle Raifer. *See, Lesko v. Lehman*, 925 F.2d 1527, 1541 (3d Cir. 1991). We therefore find no impropriety in these statements.

Moreover, while the Fifth Amendment forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt, statements regarding the absence of facts in the record need not be taken as comment on a defendant's failure to testify. *U.S. v. Brennan*, 326 F.3d at 187, citing, *inter alia*, *Griffin v. State of California*, 380 U.S. 609, 615, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) and *Bontempo v. Fenton*, 692 F.2d 954, 959 (3d Cir. 1982). Rather, a remark is directed to a defendant's silence when the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. *Id.* Applying these criteria, we cannot find that these comments were directed at or reflected the petitioner's exercise of his right to remain silent at trial. So saying, the application for a habeas writ on these grounds is denied.

Petitioner additionally challenges a number of remarks made by the prosecutor during his closing argument at the sentencing phase of the trial. Specifically, Mr. Kindler contends that the prosecutor violated his rights to due process by (1) vouching for his case by telling the jurors that it was the "position" of his office that Petitioner should be put to death but Mr. Shaw sentenced to life imprisonment, (2) telling the jurors that giving Petitioner the death penalty would "make them feel good;" (3) making impermissible references to the Bible and (4) arguing to the jurors that they should find mitigation as to Mr.

Shaw, effectively telling them that there was no available mitigation for Mr. Kindler.[18]

It is well-settled that a prosecutor may not try to buttress his case by vouching for the credibility of a government witness. *United States v. Molina-Guevara*, 96 F.3d at 704. Vouching is an impermissible assurance by the prosecuting attorney of the credibility of a government witness through personal knowledge or by other information outside of the testimony before the jury. *United States v. Dispoz-O-Plastics, Inc.*, 172 F.3d 275, 283 (3d Cir. 1999). Two criteria must be met to find vouching: (1) the prosecutor must assure the jury that the testimony of a government witness is credible; and (2) this assurance must be based on either the prosecutor's personal knowledge, or other information not contained in the record. *United States v. Milan*, 304 F.3d 273, 290 (3d Cir. 2002); *United States v. Saada*, 212 F.3d 210, 225 (3d Cir. 2000). The defendant must be able to identify as the basis for the prosecutor's comment, explicit or implicit reference to either the personal knowledge of the prosecuting attorney or information not contained in the record. *U.S. v. Brennan*, 326 F.3d at 183; *United States v. Walker*, 155 F.3d 180, 187 (3d Cir. 1998).

In this case, the petitioner first objects to the following portion of the prosecutor's closing argument at the sentencing phase of the trial:

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[18] As we have already addressed this last argument in Section 5 above in conjunction with Petitioner's argument regarding the trial court's denial of his motion to sever, we see no need to again address it here.

> "Let me at this point, ladies and gentlemen, tell you the position, the position of the office, the position of the Commonwealth. We in this case seek and urge through the evidence and the law the death penalty against Joseph Kindler. In reference to Scott Shaw, I will argue and present both of the sides and it is up to you to decide against both of these particular individuals what penalty you feel appropriate. That would be the case no matter what our office's position is but I felt from the outset here that I would let you know that the urging would be done based on the evidence would be against Mister Kindler. That does not mean that you cannot or would not, based on the evidence and the law return such a penalty if you felt appropriate, against Mister Scott Shaw. That is your power and if you find it your duty in connection with what the law is, then I am sure you would do it but I, at least, wanted to let you know that now."

(N.T. 11/16/83, 122-123).

In considering this portion of the prosecutor's argument in the context of the record as a whole, we find it clearly constituted improper vouching and harmful, constitutional error. Indeed, the entire premise of the prosecutor's argument was that the Commonwealth possessed even stronger evidence of Joseph Kindler's guilt and statutory aggravators than that presented to the jury and that was why "the urging would be done based on the evidence . . . against Mister Kindler." By contrasting Petitioner with his co-defendant and arguing in favor of the death penalty as to him alone, it further appears that the goal of the prosecutor was to use Mr. Kindler as a

"sacrificial lamb" in order to secure at least one death penalty conviction. We therefore find blatant misconduct on the part of the prosecutor here and we are compelled to grant the petition for writ of habeas corpus on the basis of this argument.

Petitioner next argues that the prosecutor violated his constitutional rights by telling the jury that the return of a death penalty against him would make them "feel good." In this regard, the prosecutor specifically argued:

> "What I ask you to do is to look at the aggravating circumstances and look at what you might believe is a mitigating circumstance. You may have one aggravating circumstance for the sake of argument and 10 mitigating circumstances and that one aggravating could outweigh because of the severity of it. That's where the weighing comes down. You on the other hand, could have one mitigating and outweigh the aggravating. That would be up for you. That's where you come into play. I do not ask you to stand up here and do anything other than to apply the law and find it reasonably.
>
> What I do ask all of you and I mean this sincerely, because I know it is tough, been here before and I know and I hear and when I understand that people that find things difficult, feel good afterwards for applying the law. For recognizing that their part, their position, their step, in the law enforcement process, was completed. They had done it, the same law that protects the defendants throughout the trial as properly it should, is the

> same law that we all must follow in applying the appropriate penalty."

(N.T. 11/16/83, 144-145).

The prosecutor did not tell the jury that it would feel good if it gave Joseph Kindler the death penalty. Rather, the gist of the prosecutor's argument here was to acknowledge the common "good feeling" of relief that one generally has after a difficult decision has been made. Thus, after reviewing these remarks in context, we do not find them to be improper and we decline to grant the writ on these grounds.

Petitioner also submits that prosecutorial misconduct occurred when Mr. McGill discussed his own "Christian values" and referred to the Bible.

Most, if not all of the federal and state courts that have considered the issue have condemned the use of religious authority in death penalty case arguments. *See, e.g., Sandoval v. Calderon*, 241 F.3d 765, 776-777 (9th Cir. 2001), citing, *Coe v. Bell*, 161 F.3d 320, 351 (6th Cir. 1998); *Bennett v. Angelone*, 92 F.3d 1336, 1346 (4th Cir. 1996); *Cunningham v. Zant*, 928 F.2d 1006, 1019-20 (11th Cir. 1991); *United States v. Giry*, 818 F.2d 120, 133 (1st Cir. 1987); *Commonwealth v. Chambers*, 528 Pa. 558, 599 A.2d 630, 644 (1991); *People v. Eckles*, 83 Ill.App.3d 292, 38 Ill.Dec. 934, 404 N.E.2d 358, 365 (1980); *State v. Wangberg*, 272 Minn. 204, 136 N.W.2d 853, 854-855 (1965). Such arguments have generally been found to be confusing, unnecessary and inflammatory. *Bennett*, 92 F.3d at 1346. Indeed, the Pennsylvania Supreme Court has decreed that reliance in any manner upon the Bible or any other religious writing in support of the imposition

of the death penalty is reversible error *per se*. *Chambers*, 599 A.2d at 644. *See Also*: *Commonwealth v. Brown*, 551 Pa. 465, 492-493, 711 A.2d 444, 457 (1998). As the Third Circuit has yet to adopt this philosophy, however, we shall likewise review the prosecutor's biblical remarks here in the context of the whole. The challenged comments are as follows:

> "Sometimes words and adverbs slipping in, perhaps attempts to place in your mind some kind of feeling of, jeez, maybe I'll do something wrong; am I really that way, or I shouldn't do it because it will make me seem like I'm eager to punish or I'm out for retribution and I don't want it and another thing is if your Christian values say not to come back with the death penalty.
>
> Well, ladies and gentlemen, I in no way and in no case at all, inasmuch as I'm a Christian myself, suggest that there is not an important phase, an important consideration of Christian values. But what we are concerned with now and the testament and the Bible will tell you that there is law in the city and there's a law of God. There is a law of this land and there is a law that we must act through this land, a spiritual law and that being the law of God. But the law that we are concerned with now, the law that convicted both of these defendants is not Christian law, so to speak, but the law of the land which you have got to abide by and apply."

(N.T. 11/16/83, 123-124). The Commonwealth avers that this argument was only made in response to defense counsel's statement that ". . . if only one of you believes that the Christian thing to do, even under these brutal circumstances, is that this man should

receive life, the verdict will stand but the sentence will be life." Considering the prosecutor's argument in the context of the whole and in view of Mr. Kindler's counsel's remarks, we do not find error of constitutional proportions. Instead, it appears that Mr. McGill's statement was indeed tailored to counter that of Mr. Alva and operated to remind the jury that the law which they were being charged with applying was not canon law. We therefore deny the petition for writ of habeas corpus on the basis of these remarks.

7. Failure of the Jury to Give Effect to Petitioner's Evidence of Mitigation.

Next, Mr. Kindler submits that his sentence must be vacated because the jury ignored the clear, uncontroverted mitigating evidence that he had no prior criminal convictions and failed to find that *any* mitigating circumstances at all existed in his case. We disagree.

It is well-settled that if a state has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not. *Parker v. Dugger*, 498 U.S. 308, 321, 111 S.Ct. 731, 739, 112 L.Ed.2d 812 (1991), quoting *Spaziano v. Florida*, 468 U.S. 447, 460, 104 S.Ct. 3154, 3162, 82 L.Ed.2d 340 (1984). This is essentially the purpose behind the consideration of aggravating and mitigating circumstances--to sort out those deserving of the death penalty from those who are not and to prevent the arbitrary and irrational imposition thereof. Thus, to pass constitutional muster under the Eighth and Fourteenth

Amendments, the sentencer can not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. *Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S.Ct. 869, 874, 71 L.Ed.2d 1 (1982), quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

Petitioner asserts that this case is controlled by *Parker v. Dugger*, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991). In that case, the defendant Parker was convicted of two first degree murders and one third degree murder in Florida state court. At the advisory sentencing hearing, Parker presented evidence in mitigation of a sentence of death and argued that such evidence had also been presented at trial. The jury found that sufficient aggravating circumstances existed to justify a death sentence but that sufficient mitigating circumstances outweighed the aggravators and it therefore recommended a life sentence on both of the first degree murders. The trial judge, who has ultimate sentencing authority under Florida law, accepted the jury's recommendation for the one murder, but sentenced defendant to death on the other, explaining that he had "carefully studied and considered all the evidence at trial and at advisory sentencing proceedings," but found "there are no mitigating circumstances that outweigh the aggravating circumstances." *Parker*, 111 S.Ct. at 734. On direct appeal, the Florida Supreme Court apparently considered and struck two of the aggravating factors but did not make its own independent determination whether the evidence supported a finding of nonstatutory mitigating circumstances. On habeas review, the U.S. Supreme

Court noted that in a weighing state, when a reviewing court strikes one or more of the aggravating factors on which the sentencer relies, it may either re-weigh the remaining evidence or conduct a harmless error analysis. Thus, reasoned the Court, the Florida Supreme Court's failure to conduct an independent re-weighing of the evidence was error. While the *Parker* case stands for an important legal proposition, it clearly is factually inapposite to the case at bar and we do not read it to require a *sentencing jury* to specifically articulate the bases for its findings. Accordingly, we do not find it dispositive here and given that there is no evidence on this record that the jury did not consider the mitigating evidence presented to it, we cannot find any error of constitutional dimension.

Moreover, as the Commonwealth points out, in this case the mitigating evidence presented by petitioner came in the form of testimony from several family friends and co-workers that he is a good, hardworking and kind person who could still do some good for society even from behind bars particularly in view of his unique skills and talents with electronics. He did not present any evidence that he had no significant criminal history, but rather that was a point which his attorney argued to the jury in his closing argument. (N.T. 11/16/83, 59-78, 104-105). Given that the jury was also properly instructed that Petitioner had the burden of proving mitigating circumstances by a preponderance of the evidence and the arguments of counsel are not evidence, we cannot find any error in the jury's finding. (N.T. 11/16/83, 152). For all of these reasons, the application for writ on the basis of this argument is denied.

8. Trial Court's Failure to Provide a Life Without Parole Instruction.

Petitioner also asserts that his rights under the Sixth, Eighth and Fourteenth Amendments were violated by virtue of the trial court's failure to include a jury instruction that under Pennsylvania law, life imprisonment means life without the possibility of parole.

The law is clear that where the defendant's future dangerousness is at issue and state law prohibits the defendant's release on parole such that the only sentencing alternative available is life imprisonment without the possibility of parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible. *Kelly v. South Carolina*, 534 U.S. 246, 122 S.Ct. 726, 728, 151 L.Ed.2d 670 (2002); *Simmons v. South Carolina*, 512 U.S. 154, 156, 114 S.Ct. 2187, 2190, 129 L.Ed.2d 133 (1994).[19]

---

[19] The Commonwealth has argued that these principles should not be applied in petitioner's case as his conviction became final before *Simmons* was decided. While it is true that the Supreme Court has found this rule to be a "new" rule not subject to retroactive application under *Teague v. Lane*, *supra*, it has also held that convictions become final upon its denial of certiorari. *O'Dell v. Netherland*, 521 U.S. 151, 157, 117 S.Ct. 1969, 1973, 138 L.Ed.2d 351, 358 (1997) ("Petitioner's conviction became final on October 3, 1988 when we declined to review the Virginia Supreme Court's decision affirming his sentence on direct review.") We therefore find that Petitioner's conviction became final on October 11, 1994 when the U.S. Supreme Court denied his petition for certiorari, some four months after the Court rendered its decision in *Simmons*.

In this case, however, it does not appear that the issue of whether the petitioner had the potential to be dangerous in the future was ever raised. (*See, e.g.*, N.T. 11/16/83, 119-145). We therefore do not find any violation of Petitioner's constitutional rights as the result of the trial court's failure to give the jury a "life without parole" instruction.[20] Accordingly, the application for writ of habeas corpus on this ground is denied.

9. Trial Court's Defective Preponderance of the Evidence Instruction and the Cumulative Effect of the Errors in this Case.

Petitioner next avers that the instructions given to the jury at the opening of the penalty phase of his trial on preponderance of the evidence were incorrect and that this constituted a violation of his rights under the Sixth, Eighth and Fourteenth Amendments. Finally, Petitioner contends that he is entitled to habeas relief based upon the cumulative prejudicial effect of all of the trial errors in this case.

---

[20] In so holding, we also reject Mr. Kindler's alternative arguments that because the trial court did not give the "life without parole" instruction, his death sentence was imposed on the basis of inaccurate information and was arbitrary and capricious. Indeed, as the Commonwealth points out, a sentence of life imprisonment in Pennsylvania is subject to possible commutation by the Board of Pardons and the Governor. *See, e.g.*, *Scarbrough v. Johnson*, 300 F.3d 302, 307 (3d Cir. 2002); *Carpenter v. Vaughn*, 296 F.3d 138, 156 (3d Cir. 2002). We thus cannot find that the death sentence was based on inaccurate information. In all other respects, the petition for habeas relief is moot given our findings that Petitioner is entitled to a new sentencing hearing based on *Mills*.

Specifically, the instructions to which Petitioner here takes exception were as follows:

> Mitigating circumstances must be proved by the defendant by a preponderance of the evidence. A preponderance of the evidence is somewhat less proof than is required for a reasonable doubt. (N.T. 11/16/83, 30).

Given our previous finding that the overall jury instructions as to the burden of proof attendant to mitigating circumstances given in this case were violative of *Mills v. Maryland*, we see no reason to address this argument again. Likewise, inasmuch we have found no constitutional error entitling Petitioner to a new trial but have found several such errors entitling him to be re-sentenced, we also decline to address his "cumulative effect" argument.

Conclusion

As discussed above, we have found prosecutorial misconduct at the penalty phase of Petitioner's trial and that the jury instructions and verdict sheet employed to sentence him did not comply with *Mills v. Maryland*. We have found no merit to the remainder of Petitioner's claims. For these reasons, the petition for writ of habeas corpus is granted only as to the sentencing portion of Petitioner's trial. The Commonwealth of Pennsylvania may conduct a new sentencing hearing within 180 days of the date of this Memorandum and Order, during which period the execution of the writ of habeas corpus shall be stayed, or shall sentence Petitioner to life imprisonment.

An order follows.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 99-cv-0161

[Dated September 23, 2003]

JOSEPH J. KINDLER	)
	)
vs.	)
	)
MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; DONALD T. VAUGHN, Superintendent of the State Correctional Institution at Graterford, and JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview	)

ORDER

AND NOW, this 23rd day of September, 2003, upon consideration of the Petition of Joseph Kindler for Writ of Habeas Corpus and the Respondents' Briefs in Reply thereto, it is hereby ORDERED that the Petition is GRANTED on the following grounds:

1. that the instructions given to the jury in the sentencing portion of the trial were in violation of the rule decreed in *Mills v. Maryland*, *supra*;

2. that the prosecutor improperly introduced and argued improper aggravating factors against the defendant and improperly vouched for the death

penalty only with respect to Petitioner during the sentencing portion of the trial in violation of his rights under the Eighth and Fourteenth Amendments to the U.S. Constitution.

IT IS FURTHER ORDERED THAT the execution of the writ of habeas corpus is STAYED for 180 days from the date of this Order, during which time the Commonwealth of Pennsylvania may conduct a new sentencing hearing in a manner consistent with this Memorandum Opinion. If, after 180 days, the Commonwealth of Pennsylvania shall not have conducted a new sentencing hearing, the writ shall issue and the Commonwealth shall sentence Petitioner to life imprisonment.

No certificate of appealability shall issue. *See Generally*: 28 U.S.C. § 2253.

BY THE COURT:

_____

J. CURTIS JOYNER, J.

PETITIONER'S BRIEF

135

(3)

No. 08-992

Supreme Court, U.S.
FILED
JUL 24 2009
[redacted]
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JEFFREY A. BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL.,
Petitioners,

v.

JOSEPH J. KINDLER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONERS

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July 24, 2009

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BOTH 4X3JIC

Capital Case

Question Presented

After murdering a witness against him and receiving a sentence of death, Kindler broke out of prison, twice. Prior to his recapture in Canada years later, the trial court exercised its discretion under state forfeiture law to dismiss Kindler's post-verdict motions, resulting in default of most appellate claims. On federal habeas corpus review, the court of appeals refused to honor the state court's procedural bar, ruling that, because "the state court . . . had discretion" in applying the rule, it was not "firmly established" and was therefore "inadequate."

Is a state procedural rule automatically "inadequate" under the adequate-state-grounds doctrine – and therefore unenforceable on federal habeas corpus review – because the state rule is discretionary rather than mandatory?

List of Parties

Petitioners

Jeffrey A. Beard, Secretary, Pennsylvania Department of Corrections

David DiGuglielmo, Superintendent, State Correctional Institution at Graterford

Joseph P. Mazurkiewicz, Superintendent, State Correctional Institution at Rockview

Respondent

Joseph J. Kindler

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Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit, affirming the district court's grant of a conditional writ of habeas corpus, was entered September 3, 2008, is published at 542 F.3d 70, and is reproduced in the Certiorari Petition Appendix at Cert. App. 1-53.

The opinion of the United States District Court for the Eastern District of Pennsylvania, mandating either a new penalty hearing or a sentence of life imprisonment, was entered September 23, 2003, is published at 291 F. Supp. 2d 323, and is reproduced in the Appendix at JA 386-462.

Statement of Jurisdiction

This Court has jurisdiction to review the judgment of the court of appeals under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved are the Sixth and Eighth Amendments to the United States Constitution and 28 U.S.C. § 2254.

Statement of the Case

After his conviction for murdering a witness against him, Kindler sawed through a prison bar and escaped to Canada. After his capture there, Kindler escaped again by breaking through a skylight and climbing down the outside of a thirteen-story building. It took more than seven years to get him back. In the

meantime, the state trial judge dismissed Kindler's post-verdict motions as a result of his escape, and the state appellate courts upheld the resulting procedural default.

But not the federal court of appeals. When the case reached federal habeas review, that court held that the procedural default was not an adequate state ground, because Pennsylvania's escape rule was discretionary, and thus could not be "firmly established." Accordingly, the federal court reached the merits of claims the state courts never had occasion to address, vacated Kindler's sentence of death, and ordered a new penalty hearing a quarter century after the original trial.

The crime dates back to 1982. Kindler committed a burglary. With police converging on the scene, Kindler managed to slip away, leaving his accomplice, David Bernstein, to be arrested. Bernstein admitted his role in the crime and identified Kindler as the ringleader. Cert. App. 89.

Kindler learned that Bernstein would be a witness against him in court. Before trial, Kindler proclaimed his intent to kill Bernstein to keep him from testifying. Bernstein, fearing Kindler's violence, made plans to move away. Cert. App. 90-91.

The day before the move, in July 1982, Kindler sent a female friend to Bernstein's apartment to lure him outside. When Bernstein opened the door, Kindler dragged him out and beat him repeatedly with a baseball bat. Then he instructed a cohort to strike the victim with an electric prod. Once the victim was

incapacitated, Kindler dragged him to a car, leaving a bloody trail. Cert. App. 91-92.

Kindler stuffed Bernstein in the trunk of the car and drove him to a river. There he tied a cinder block to Bernstein's neck and held him down to fill his lungs with water. Cert. App. 92.

Alerted about the abduction by a neighbor, police later found the car Kindler had used, along with the bloody baseball bat, the electric prod, and clothing. Bernstein's body eventually surfaced, the cinder block still tied around his neck. He was 22 when he died. Cert. App. 80, 92-94.

Kindler was convicted by a jury in Philadelphia Common Pleas Court, and was sentenced to death in November 1983. Post-verdict motions were filed. But in September 1984, Kindler escaped from the maximum-security wing of the prison where he was being held, by sawing through a steel bar and breaking out a window. Cert. App. 68-69.

The trial court dismissed Kindler's post-verdict motions because of his escape. Kindler was not heard from until the following year, when he was arrested in Quebec. He fought extradition while being held in a prison in Montreal. Cert. App. 69.

But in October 1986, Kindler constructed a rope by tying bed sheets together, broke through a skylight, and escaped again, lowering himself thirteen floors to the ground. An accomplice in the escape lost his grip on the rope and was killed in the fall. Cert. App. 69.

This time Kindler remained at large for two years. His case was featured in an episode of "America's Most Wanted" broadcast on April 17, 1988.[1] Finally, he was identified and arrested in September 1988, in New Brunswick. He fought extradition again. After three years of litigation through the court system, the Supreme Court of Canada rejected Kindler's challenge, by a 4-3 vote, and he was deported in October 1991. Cert. App. 69, 81. *See Kindler v. Canada (Minister of Justice)* [1991] 2 S.C.R. 779.[2]

Upon his forced return to Pennsylvania, Kindler sought reinstatement of his post-verdict motions. The trial court denied the request, ruling that Kindler's involuntary reappearance did not entitle him to review. Having reached retirement, the original judge was replaced with a new common pleas judge, who issued an opinion on the matter. The court concluded that there was no abuse of discretion in refusing to

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[1] A DVD containing a copy of the broadcast (Season 1, Episode 11) was lodged with the court of appeals and is available in the record certified to this Court. The broadcast contained an excerpt of an interview with Kindler conducted before his re-escape, in which he explained to a Canadian audience his presence in their dominion: "I knew there was no death penalty here, one, and . . . the closest way out of the country was Canada. It would be hard to go into South America because of passports, and in North American [sic] there's no passport needed to cross the border. So Canada was my first choice."

[2] Kindler filed a complaint against Canada with the United Nations Human Rights Committee. The committee rejected Kindler's arguments in a decision issued after his return to the United States. *Kindler v. Canada*, Comm. No. 470/1991 (U.N. Human Rights Committee) (July 30, 1993), *reprinted in* 14 Hum. Rts. L.J. 307 (1993).

consider Kindler's post-verdict motions in response to his flight to a foreign country. JA 66-70.

Kindler filed a direct appeal to the Pennsylvania Supreme Court. He asserted that the trial court had indeed abused its discretion. The supreme court ruled in 1994 that the trial court had acted properly, and that Kindler had therefore waived all claims but those for which review was mandated by statute. The court then considered these mandatory issues: whether the evidence was sufficient to support the finding of guilt and the aggravating circumstances, and whether the sentence was excessive, disproportionate, or arbitrary. Finding no error, the supreme court affirmed the judgment of sentence. Cert. App. 82-97.

Two years later, in 1996, Kindler filed a petition for post-conviction relief under the Pennsylvania Post-Conviction Relief Act (PCRA). He argued that he was entitled to merits review of all claims. The trial court, after reviewing the circumstances of Kindler's (two) escapes and applying the waiver and previous litigation provisions of the PCRA, 42 Pa. C.S. § 9544, denied the petition. JA 183-92. On appeal, the Pennsylvania Supreme Court affirmed the denial of post-conviction relief in 1998. Cert. App. 71-77.[3]

In 1999, Kindler filed a federal habeas corpus petition in the Eastern District of Pennsylvania. The district court ruled, in 2003, that it was not bound by

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[3] Kindler later filed another post-conviction petition that is unrelated to the current proceedings. That petition was dismissed as untimely and the dismissal was upheld on appeal. *Commonwealth v. Kindler*, 970 A.2d 426 (Pa. 2009).

Kindler's default of his claims in state court, because the state ground was "inadequate." The district court then reviewed Kindler's challenges on the merits, granting sentencing relief under *Mills v. Maryland*, 486 U.S. 367 (1988), and rejecting the balance of the claims. Cert. App. 54-66.

The parties cross-appealed to the Court of Appeals for the Third Circuit. The appeals court held that the state courts could not validly punish Kindler for his (two) escapes by dismissing his claims. The court reasoned that, because state law allowed for discretion to reinstate post-verdict motions following a fugitive's recapture, any exercise of that discretion to deny reinstatement was not the product of a "firm" rule, and therefore could not provide an adequate state ground. Cert. App. 20-23.

Proceeding to the merits, the appeals court was able to apply *de novo* rather than deferential review, *see* 28 U.S.C. § 2254(d), because, once the state procedural default ruling was removed on adequacy grounds, there was no state court merits adjudication to defer to. The appeals court then upheld the district judge in all respects but one: that he should have vacated Kindler's death penalty not just on the *Mills* claim, but also on the ground that trial counsel was ineffective for not finding additional mitigation evidence to present at sentencing.[4] Cert. App. 23-53.

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[4] Although there was never an evidentiary hearing on this claim, the court of appeals accepted at face value various offers of proof submitted by Kindler, in which he alleged, *inter alia*, that he suffered from "narcissistic personality disorder." Cert. App. 37-40.

Summary of Argument

This case aptly illustrates the need for clarification of the adequate state grounds doctrine. The criminal defendant here committed the most naked kind of procedural default, in the most conspicuous sort of way. He broke his way out of prison in a carefully plotted escape, made his way to Canada for the expressed purpose of negating his death sentence, committed new crimes there, broke out of prison again, in a fashion even more egregious than the first time, and then used every available legal process to ensure that he would never have to face the legal process from which he had fled.

And yet, when all these efforts failed (and just barely), the defendant insisted that he should be allowed to restart his state court appeals right where he had left off. The state courts – not surprisingly – said no.

Invoking the adequate state grounds doctrine, however, the federal court of appeals held, on habeas corpus review, that it could disregard the default ruling and decide the merits of the claims that the defendant was disentitled to litigate in state court. The court of appeals interpreted this Court's precedents to compel a finding of "inadequacy" for any state procedural rule that permits the state courts to exercise a degree of discretion. If the state court is free to excuse the onerous consequences of a default in appropriate cases, said the court of appeals, that is not a good thing but a bad thing, because then the state rule is not "firmly established" and "consistently applied." A federal habeas court need not respect it.

This inside-out analysis is characteristic of many adequacy rulings in habeas cases from the lower federal courts; but it is not required by a fair reading of this Court's adequate state grounds decisions. Nothing in the precedents entitles federal courts to punish states, in effect, for exercising forbearance in applying their own procedural rules. Nor is it clear why the federal courts would even *want* to. Few if any rules can appropriately be applied in an absolute fashion. Courts *should* make exceptions. And if they do, it should not be at the Catch-22 cost of nullification, so that the rules become unenforceable even against litigants who have no good excuse for violating them.

Certainly federal courts themselves labor under no such constraints. They are equally guilty of "inconsistency," as they exercise discretion in applying procedural rules all the time. The most common case is the plain error rule, but a more pointed example is the federal fugitive forfeiture rule, which allows for the same kind of "uneven" enforcement that the state courts were accused of here. In our federal system, how can procedural leeway be invaluable in federal courts but "inadequate" in state courts?

The source of this misuse of the adequacy doctrine is a confusion between description and definition. Many of the labels that this Court has used to describe inadequacy, such as "pointless severity," have been accorded an ill-suited status as legal standards. The best reading of the cases, as WRIGHT & MILLER suggests, is that the true measure of an adequate state procedural ground is that it provide reasonable notice of its terms and reasonable opportunity for compliance.

If so, then federal courts can be reasonably assured that the rule operates neutrally, rather than as a pretext for evading federal claims. That is as far as it goes; the purpose of the adequate state grounds doctrine is not to exercise supervisory authority over the state courts. A litigant should be held to his state law default if the law gave him sufficient notice to allow a reasonable person a reasonable chance to comply.

Joseph Kindler, of all people, can have no complaint that he lacked the necessary notice and opportunity. He did not need to know the exact outcome of his flight to know that it would impair his ability to appeal his sentence. He simply chose to "appeal" the sentence in a different way, by going someplace where it would never be enforced. It is hard to imagine a stronger case for a default.

And yet for Kindler, now that the federal courts have thrown out his default, there is nothing but upside from his decision to abscond. Either he was going to get away, or he is going to be treated as if he never left. The story at this point is "heads I win, tails you'll never find me."[5] No reasonable understanding of the adequacy doctrine can support that result.

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[5] *Antonio-Martinez v. INS*, 317 F.3d 1089, 1093 (9th Cir. 2003).

Argument

I. A discretionary state procedural rule is not automatically "inadequate" under the adequate-state-grounds doctrine.

Consistent with federal practice, the state court exercised its discretion to dismiss Kindler's post-verdict motions while he was a fugitive. That dismissal created a procedural default that the state appellate court applied against Kindler on appeal.

On federal habeas corpus attack, the court of appeals refused to honor the state ruling, as it would normally be required to do. The court held that the default was "inadequate" to bar review of Kindler's legal claims, because the state's fugitive forfeiture rule was discretionary. The federal court did not challenge the manner in which the state court exercised its discretion; it was the simple existence of discretion that rendered the rule unenforceable.

The circuit court's reasoning underscores a deeper uncertainty about the nature of the adequate state grounds doctrine, which should now be rectified. First, however, a further word is necessary about the grounds of the decision below. Kindler has argued that this case is not really about discretion at all. Instead, he says, the problem is that the state sprang a different, "mandatory" rule on Kindler, rather than the "discretionary" rule in place when he elected to depart the jurisdiction.

But review of the opinions demonstrates that, in fact, the state courts applied a discretionary rule, and the federal court ruled on that basis. Pennsylvania

appellate decisions in place at the time of Kindler's escape plainly described the fugitive flight rule as discretionary.[6] That was precisely the standard identified by the common pleas court in its opinion addressing Kindler's forfeiture. JA 70 (no "abuse of discretion"). On appeal, the issue before the state supreme court was similarly framed as whether "it was an abuse of discretion to dismiss [Kindler's] post-verdict motions." Cert. App. 82.[7]

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[6] *See, e.g., Commonwealth v. Boyd*, 366 A.2d 934, 934-35 (Pa. Super. 1976) ("The sole question is whether or not the trial court acted properly in dismissing the post-trial motions and refusing to reinstate and reconsider them when appellant returned.... If he thereafter returns it is a matter of discretion of the court whether or not the circumstances justify a reinstatement of his post-trial motions or applications.... We find that the ... trial court did not abuse its discretion in refusing to consider the motions"); *Commonwealth v. Clark*, 446 A.2d 633, 634 (Pa. Super. 1982) ([W]hen appellant returns to the court's jurisdiction, this court may grant leave to re-file post-trial motions.... While it is within our discretion to remand for reinstatement, as did the [*Commonwealth v.*] *Galloway* [333 A.2d 741 (Pa. 1975)] court, we are not constrained to do so. We conclude instead that the trial court did not abuse its discretion in declining to reinstate appellant's post-trial motions even after he was returned to the jurisdiction").

[7] The Commonwealth urged the state supreme court to apply a mandatory forfeiture rule, and the desirability of such a general rule generated separate opinions from the court. All participating justices, however, agreed that in this case the trial court had discretion and did not abuse it. *See, e.g.*, Cert. App. 84 (question becomes whether trial court "has authority to dismiss"; trial court has "right" to fashion appropriate response, which "can include" dismissal) (lead opinion); Cert. App. 101 "trial court possessed full authority to dismiss" (concurring opinion); Cert. App. 104 ("could be circumstances" justifying reinstatement, but "not present in this case") (concurring opinion).

And it was exactly because of such discretion that the federal court of appeals declared the state rule inadequate. Discussing a prior panel opinion that had reviewed Pennsylvania fugitive law, *Doctor v. Walters*, 96 F.3d 675 (3rd Cir. 1996), the court explained that there

> we concluded that Pennsylvania courts *had discretion* to hear an appeal filed by a fugitive who had been returned to custody before an appeal was initiated or dismissed. *Id.* at 686. *Accordingly*, the fugitive forfeiture rule was not "firmly established" and therefore was not an independent and adequate procedural rule.... When Kindler escaped in 1984, ... the state trial court still *had discretion* to reinstate his post-verdict motions. *Accordingly*, we conclude that, under *Doctor*, Pennsylvania's fugitive waiver law did not preclude the district court from reviewing the merits of the claims raised in Kindler's habeas petition.

Cert. App. 22-23 (emphasis supplied).[8]

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[8] Kindler has complained that the *Doctor* opinion did not actually turn on the discretionary aspect of Pennsylvania's flight rule. But that assertion, whether or not accurate, is irrelevant. Whatever the panel's intentions about *Doctor*'s scope when it was decided thirteen years ago, the Third Circuit has since made plain its position that a state procedural rule allowing for the exercise of discretion will not be honored in federal court. *See Lines v. Larkins*, 208 F.3d 153, 168-69 (3rd Cir. 2000) ("when Doctor escaped, Pennsylvania courts recognized that they *had the discretion* to [excuse the default]. *Accordingly*, we held that Pennsylvania's fugitive forfeiture rule was not an adequate and independent state rule") (emphasis supplied). That is the principle that was applied here.

The court of appeals, like several other courts of appeal, refused to enforce a just and reasonable rule, simply because the state courts had the discretion to apply it on the facts and circumstances of particular cases.[9] That understanding of the adequacy doctrine is wrong.

A. *This Court's adequacy cases provide no proper basis for such a result.*

As this Court has long held, state courts have the power to prescribe their own rules of practice, and those rules "are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of" state law. *Central Union Telephone Co. v. City of Edwardsville*, 269 U.S. 190, 195 (1925).

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[9] *See, e.g., Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995) (once highest state court announced that state procedural requirement must henceforth be enforced "as a rule," state courts "were no longer acting with any discretion" in applying the requirement; procedural bar would now be considered adequate); *Deitz v. Money*, 391 F.3d 804, 811 (6th Cir. 2004) (under state law, motion to grant leave to appeal is "solely within the discretion" of the court; "[a] rule that grants such discretion to the courts is not firmly established and regularly followed so as to be adequate" state ground); *McKenna v. McDaniel*, 65 F.3d 1483, 1488-89 (9th Cir. 1995) (under state law, state court had "power . . . to address plain error"; *"[t]hus*, the state court's refusal to entertain McKenna's complaints on collateral review, at best, represents a refusal to exercise discretion to hear the claim. This is insufficient for the State to invoke the procedural bar doctrine")(emphasis supplied); *Sechrest v. Ignacio*, 549 F.3d 789, 803 (9th Cir. 2008) (*Because* the [state court] exercised a 'general discretionary power' to address defaulted constitutional claims in capital cases, the [state court] did not 'adhere regularly' to [the state rule]. We *therefore* concluded that [the state rule] was an inadequate state procedural bar") (emphasis supplied).

"Thus, ordinarily when a state court litigant has committed a procedural default – that is, has failed to raise a federal question in accordance with state procedural rules – the state court will refuse to decide the federal question," and review will be barred in federal court as well. Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 576 (4th ed. 1996).

Over the last century, however, the Court has decided "a small set of cases forming a limited exception to the general rule." *Id.* In these cases, the state procedural default has been held "inadequate" to support the state court judgment, thereby empowering the federal court to reach the merits of the federal claim.[10] The Court has employed a number of different formulations to identify this "inadequacy." A simpler, more workable approach is possible, as argued in section II below. But in any case, none of the precedents support the court of appeals' sweeping holding that discretionary procedural rules are inadequate *per se*.

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[10] In federal habeas corpus cases, such as this one, there is also an additional way to overcome a state procedural default: the "cause and prejudice" rule. The rule allows the habeas court to decide the merits if there was cause for the default and prejudice from the alleged violation of federal law, or if there was a miscarriage of justice such as actual innocence. *See, e.g., Murray v. Carrier*, 477 U.S. 478 (1986); *Coleman v. Thompson*, 501 U.S. 722 (1991). Of course, there is no need to engage in cause-and-prejudice analysis if the habeas court can first deem the state procedural ruling "inadequate."

1. "Discretion" cases.

Among the "small set" of adequacy cases, only a few refer to the state rules in question as discretionary. Properly read, these cases establish that the existence of such discretion does not render the rule inadequate, and therefore unenforceable, whenever a defaulted claim reaches federal court.

The earliest adequacy case to discuss a discretionary rule is *Williams v. Georgia*, 349 U.S. 375 (1955). A criminal defendant made a late challenge to the jury array, after he learned that the court had used a special method to exclude blacks when summoning prospective jurors. Georgia precedent gave the courts discretion to consider such motions in exceptional or extraordinary cases, but here the court refused to do so.

This Court stated that, in light of such discretion, it could consider whether the state court was, in effect, attempting to *avoid* the federal claim. 349 U.S. at 383. The Court then proceeded to do so, looking at a number of cases in which the Georgia courts had in fact granted similarly untimely motions. 349 U.S. at 384-89. What mattered was not the existence of discretion in itself, but the discriminatory manner in which the state courts had employed it.[11]

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[11] *See also Wolfe v. North Carolina*, 364 U.S. 177, 188, 194-95 (1960) (state court's refusal to exercise "wide discretion" to go outside record was not done arbitrarily to evade federal claim); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 297-301 (1964) (state court's finding of default held inadequate where, in previous cases, court had regularly exercised its discretion to excuse noncompliance with brief-formatting rule allegedly violated here).

To the same effect is *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). A complaint challenged racial discrimination in a community park. The state court held the claim defaulted because the appellant had not given his opponent reasonable opportunity to review the transcript to be certified for appeal. This Court noted without discussion that the state procedural requirement was not consistently applied, and therefore amounted to a discretionary rule that did not bar federal review. 396 U.S. at 233-34.

A more complete explanation is provided in Justice Harlan's separate opinion. Although it is labeled as a dissent, Justice Harlan in fact agreed with the Court's disposition of the adequate state grounds question. But he provided a more rigorous analysis. He recognized that procedural rules employing words like "reasonable" in fact produce "such flexible standards that the [court] has the 'discretion' to decide a close case either of two ways." But that is how common law develops: "[t]his kind of 'discretion' is nothing more than the judicial formulation of the law." Accordingly, Justice Harlan rejected any implication that a "decision made pursuant to a broad standard cannot provide an adequate state ground." 396 U.S. at 244-45.

That did not mean, however, that the state was off the hook. Justice Harlan proceeded to explore the manner in which the state court had previously construed its rule. Prior cases revealed that the state court had regularly upheld, as "reasonable," much *less* notice than was provided in this case. Justice Harlan concluded that, while the underlying rule of court was not new, the standard of strictness invoked here could

not reasonably have been anticipated by the litigant. *That* is why the state ruling was inadequate. 396 U.S. at 245-47.

Justice Harlan's views were echoed in this Court's most recent case to touch on the discretion question, *Jimmy Swaggart Ministries v. Board of Equalization of Cal.*, 493 U.S. 378 (1990). The state appellate court had ruled that a due process taxation challenge was waived because it was not preserved below. In so ruling, the state court declined to apply an exception – for "important questions of public policy" – that would have excused the default.

When the case came here, the litigant challenged the adequacy of the default, in view of the state's failure to apply its "public policy" exception. Although this Court did not explicitly refer to the exception as "discretionary," the exception clearly amounted to the kind of flexible standard that Justice Harlan spoke of in *Sullivan*. And, consistent with the Harlan viewpoint, the Court upheld the default ruling as adequate, despite the fact that it was made pursuant to a broad standard that could easily have supported a decision either way. Indeed, the state court *had* ruled the other way, in this very case, on a different claim; the state court chose to review that claim on the merits despite an acknowledged default. But the discretionary power to make such distinctions – even if the state court had "erred as a matter of state law" – did not render the state procedural rule inadequate. 493 U.S. at 398-99.

Plainly, this Court's "discretion" cases do not support the conclusion of the court of appeals that discretion equals inadequacy.

2. "Firmly established" cases.

In discrediting Pennsylvania's fugitive flight rule, the federal court of appeals did not mention any of this Court's discretion decisions, relying instead on cases from a different line of adequacy precedent. Specifically, the court of appeals cited *Johnson v. Mississippi*, 486 U.S. 578 (1988), and *Ford v. Georgia*, 498 U.S. 411 (1991), for the proposition that state rules must be "firmly established" and "consistently and regularly" applied. Cert. App. at 20.

But the court of appeals did not attempt to explain why a state rule of procedure fails this test merely because the state courts retain discretion to mitigate the rule in appropriate cases. Many federal rules of procedure allow for the exercise of considerable discretion,[12] but surely they are not, *ipso facto*, unfirmly established or inconsistently applied. Indeed, if state procedural rules really were invoked without any discretion to make exceptions in appropriate circumstances, they would undoubtedly be attacked as "exorbitant applications," *Lee v. Kemna*, 534 U.S. 362, 376 (2002), of "pointless severity," *NAACP v. Alabama*

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[12] *See, e.g.*, Fed. R. Crim. P. 7(e) (court may permit amendment of information unless "substantial right" of defendant is prejudiced); Fed. R. Crim. P. 26.2(e) (if government disobeys order to produce witness statement, court must grant mistrial "if justice so requires"); Fed. R. App. P. 3(a)(2) ("An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal"); Fed. R. App. P. 26(b) ("For good cause, the court may extend the time prescribed by these rules or by its order to perform any act [with certain specific enumerated exceptions], or may permit an act to be done after that time expires").

ex rel. Flowers, 377 U.S. 288, 297 (1964), in an "arid ritual of meaningless form," *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958).

Nothing in the cases cited by the court of appeals commands such an absurd result. In *Johnson v. Mississippi*, the state default ruling was held inadequate because it would have been impossible for the litigant to raise the claim earlier, and because prior state law specifically directed him not to do so. 486 U.S. at 587-89. In *Ford v. Georgia*, the state default ruling was held inadequate because the state court had invented an entirely new time requirement two years after the litigant's trial, and applied it retroactively against him. 498 U.S. at 422-25. That sort of "inconsistency" does not remotely require the disregard of state rules merely because they allow for the exercise of discretion.[13]

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[13] In *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), this Court addressed a circuit split concerning an analogous issue, regarding the application of 28 U.S.C. § 2244(d)(2). *Compare Siebert v. Campbell*, 334 F.3d 1018, 1025 (11th Cir. 2003) ("only rules that are 'firmly established and regularly followed' qualify as adequate state grounds. . . . [T]his standard likewise applies to state procedural rules in the 'properly filed' inquiry under § 2244(d)(2)"), *with Brooks v. Walls*, 279 F.3d 518, 523-24 (7th Cir. 2002) (state procedural bar with discretionary plain error exception is nonetheless an adequate state ground, just as state timeliness rule with discretionary plain error exception is nonetheless a "proper filing" requirement under § 2244(d)(2)).

Pace resolved the split by requiring federal habeas courts to honor state court rulings imposing defaults for untimely post-conviction filings, whether the deadlines were more or less strictly administered by the states. 544 U.S. at 414, 417 ("When a postconviction petition is untimely under state law, 'that is the end of the matter' for purposes of § 2244(d)(2)"); *accord Allen v.*

3. "Legitimate state interest" cases.

In *Henry v. Mississippi*, 379 U.S. 443 (1965), the Court announced a new descriptor for inadequacy, declaring that the ruling in question must serve a "legitimate state interest" (or at least "substantially" serve it). *Id.* at 447-48. This concept was derived from the Court's decision in *Fay v. Noia*, 372 U.S. 391, 433 (1963) (state has no interest, "under the guise of applying the adequate state-ground rule," in enforcement of defaults on federal habeas corpus review).

Fay v. Noia was overruled thirty years ago in *Wainwright v. Sykes*, 433 U.S. 72 (1977), and *Henry* has been cited only intermittently in succeeding decades. In its most recent major discussion of the adequate-state-grounds doctrine, *Lee v. Kemna*, 534 U.S. 362 (2002), the Court expressly disavowed any reliance on *Henry*. *Id.* at 386.

Even assuming the continuing validity of the *Henry* line of adequacy cases, however, there would be no basis under it for refusing effect to state procedural rules that call for discretionary application. That is because such rules plainly do serve a legitimate interest, just as they do in federal court. "There are

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Siebert, 128 S. Ct. 2, 4 (2007) ("The fact that Alabama's [time bar] ... is subject to equitable tolling . . . renders it no less a 'filing' requirement ...; it only makes it a less stringent one.... Under the Court of Appeals' approach, federal courts would have to delve into the intricacies of state procedural law in deciding whether a postconviction petition rejected by the state courts as untimely was nonetheless 'properly filed' under § 2244(d)(2). Our decision in *Pace* precludes such an approach").

many valid reasons for framing procedural rules in general, 'discretionary' terms. Precisely defined rules cannot take account of the gravity of a procedural failure, the strength of the excuses offered, or the importance of the procedural and substantive consequences of excusing or punishing the failure." 16B C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4026, at 385-86 (2nd ed. 1996).

Indeed it is unclear why it would be in anyone's interest to disfavor discretion. It mostly helps the litigant – by providing exceptions to rigid rules that would otherwise cause a default. There is no way to remove it, or even restrain it, without redoubling the number of defaults. "If, in order to insulate its decisions from reversal by [federal courts], a state court must strip itself of the discretionary power to differentiate between different sets of circumstances, the rule operates in a most perverse way." *Henry v. Mississippi*, 379 U.S. at 463 n.3 (Harlan, J., dissenting).[14] The holding of the court below cannot

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[14] *See also Hutchison v. Bell*, 303 F.3d 720, 738-39 (6th Cir. 2002) ("to find that the repeated application of [judicially created "due process" exception to state post-conviction filing deadline] renders the Tennessee statute of limitations an inadequate basis to deny postconviction relief would have the unfortunate effect of discouraging a practice that provides states the opportunity to remedy unconstitutional convictions in cases involving later-arising claims"); *Prihoda v. McCaughtry*, 910 F.2d 1379, 1385 (7th Cir. 1990) ("The difficulty of drawing lines, especially under standards such as 'sufficient reason,' makes uncertain application inevitable. Uncertainty is not enough to disqualify a state's procedural ground as one 'adequate' under federal law. If it were, states would be induced to make their rules draconian rather than allow prisoners the latitude now available"); *Rogers-Bey v. Lane*,

be justified on "legitimate state interest" grounds.

B. A per se inadequacy attack on discretionary state procedural rules is incompatible with federalism.

Prior precedent is not the only impediment to the result below. The principle of federalism recognizes that the states are co-equal sovereigns. A declaration by a federal court that a state procedure is "inadequate" should be a cautious departure from the rule. It would be troubling enough if the Court were to undermine, through the adequacy doctrine, the justifiable judgment of the state courts to employ elements of discretion in their procedural rules. But that is especially so where, at the same time, federal courts themselves are employing the same kind of discretion to excuse procedural defaults. In our federal system, the singling out of state discretion as inadequate, while federal courts are free to exercise their own, should be obviously unacceptable.

Perhaps the most common example of default discretion in the federal courts is the plain error rule, Fed. R. Crim. P. 52(b). The rule itself says nothing at

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896 F.2d 279, 284 (7th Cir. 1990) (Manion, J., concurring) ("The fact that the state court has the discretion to disregard procedural defaults where plain error exists does not mean the state loses its right to stand on its procedural rules on collateral attack when the state court decides that no plain error exists. If a state court's review for plain error allowed federal courts to review the merits of issues that would otherwise be procedurally barred, states might become reluctant to exercise their discretion to correct plain errors. This is a result we ought not encourage").

all about how to identify plain error. Over decades, the judicial development of the law has provided some guidance. Just last Term, in *Puckett v. United States*, 129 S. Ct. 1423 (2009), this Court reiterated four steps for plain error determination. That step approach, however, by no means eliminates the possibility of inconsistency. The second step requires that the error be "clear," while the third step requires that it "substantially" affect the defendant's rights – both modifiers of sufficient breadth as to allow abundant wiggle room. The fourth step, meanwhile, explicitly requires the court to exercise "discretion" in deciding whether to excuse the default, even if the first three steps have been surmounted. 129 S. Ct. at 1429.[15]

Not surprisingly, that sort of latitude breeds significant variation in application of the plain error rule, as *Puckett* itself suggests. 129 S. Ct. at 1428 (noting circuit conflict on plain error in plea bargain violation claims). Other instances abound. "*Booker*" errors,[16] for example, have generated considerably different results among the circuits attempting to apply various aspects of the plain error standard.[17]

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[15] "The fourth prong is meant to be applied on a case-specific and fact-intensive basis. We have emphasized that a *per se* approach to plain-error analysis is flawed." 129 S. Ct. at 1433.

[16] *United States v. Booker*, 543 U.S. 220 (2005) (invalidating federal sentencing guidelines).

[17] *See, e.g.*, *United States v. Crosby*, 397 F.3d 103 (2nd Cir. 2005); *United States v. Rodriguez*, 398 F.3d 1291, 1305-06 (11th Cir. 2005) (rejecting Second Circuit approach); *United States v. Paladino*, 401 F.3d 471, 484-85 (7th Cir. 2005) (rejecting Eleventh Circuit approach); *United States v. Gonzales-Huerta*, 403 F.3d 727, 736-37 (10th Cir. 2005) (rejecting Second and Seventh Circuit approach).

While some of these differences may eventually be reconciled, no one would conclude that the federal plain error rule is invalid because it allows for inconsistent outcomes.

But the most important example of federal procedural discretion, for purposes of this case, is the federal fugitive flight rule. As this Court has made clear, the rule cannot operate in a mandatory fashion. Instead, cases must be examined on their individual circumstances – much like the Pennsylvania rule that the court below held inadequate. *Ortega-Rodriguez v. United States*, 507 U.S. 234 (1993) (overturning circuit court's rule of automatic dismissal for pre-sentence escapes, but upholding authority of district courts to exercise discretion to punish such escapes).

The lower federal courts have thus been left with broad license to make those fugitive forfeiture decisions. Of course that means that results will vary, and distinctions, where they exist, will not always be made apparent.[18] That will be the case in any system of discretion. This Court itself has chosen a variety of responses when litigants have fled while cases were

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[18] *E.g.*, *United States v. Eskandarian*, 172 Fed. Appx. 163 (9th Cir. 2006) (unpublished) (summarily dismissing appeal); *United States v. Welch*, 155 Fed. Appx. 369 (9th Cir. 2005) (unpublished) (same); *United States v. Guerrier*, 428 F.3d 76, 79 (1st Cir. 2005) (summarily declining to dismiss); *United States v. Freelove*, 816 F.2d 479, 480 (9th Cir. 1987) (dismissing but with automatic right of reinstatement); *United States v. Torres*, 221 Fed. Appx. 646 (9th Cir. 2007) (dismissing but with opportunity to seek reinstatement in court's discretion); *see United States v. Awadalla*, 357 F.3d 243, 247 (2nd Cir. 2004) (cases provide "surprising shortage of guidance").

pending here. *See, e.g., Eisler v. United States*, 338 U.S. 189 (1949) (deferring action); *Molinaro v. New Jersey*, 396 U.S. 365 (1970) (dismissing immediately); *United States v. Sharpe*, 470 U.S. 675 (1985) (deciding merits). Yet there is no suggestion that federal practice is inherently unfair just because judges have liberty to decide individual cases on individual facts.

The same must be true for the states. Federalism demands as much respect for state rules of discretion as for federal rules of discretion. Pennsylvania's fugitive disentitlement practice was not inadequate *per se*.

II. The adequacy doctrine requires simply that state rules provide reasonable notice and opportunity to raise federal claims.

Absent the *per se* rule applied by the court of appeals, there is still a question about the appropriate analysis for assessing the adequacy of the default ruling in this case. Despite a long line of adequacy doctrine decisions, the Court "has never articulated a coherent modern rationale, and it is not easy to weave a pattern from the threads of its opinions." 16B WRIGHT & MILLER, § 4020, at 292. Many of the approaches stated in the cases "have lain fallow, to be revived at unpredictable intervals." *Id.*, § 4028, 2009 supplement at 50. Some of the Court's pronouncements (*e.g.*, "arid ritual," "pointless severity") are more of a metaphor for inadequacy than a means of actually measuring it.

A new effort to state a standard for inadequacy is especially important now. For most of the history of the doctrine, the only court ever to apply it was this

one. With the explosion of habeas corpus litigation, that has changed. For every adequacy question this Court decides, there will be hundreds in the lower courts. The potential for misapplication is multiplied.[19]

But there is a way to clarify the adequacy doctrine. "[T]he most generally functional test is that state law must afford a fair opportunity to present federal claims." 16B WRIGHT & MILLER, § 4027, at 387. That simple standard for adequate state grounds would carry out the core function of the doctrine, in a manner consistent with the bulk of the Court's adequacy precedent.

A. Evasion of Federal Rights.

To find the most appropriate articulation of the adequacy inquiry, it is best to begin with a look at the doctrine's purpose. Plainly, it is not the business of the federal courts to make value judgments about the wisdom of state procedural rules or rulings. The adequate state grounds doctrine exists to determine whether a state law ruling *really is* a state law ruling, or whether it is instead a means of evading or avoiding a properly presented federal claim. If the state court denies a federal claim *because* of rather than regardless of its merits, that ruling is not, in reality, a

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[19] And the impact of that multiplication is magnified under the current habeas statute. The general rule is that a claim defaulted in state court is barred from review in federal habeas court, while a claim adjudicated in state court is subject to deference review in federal habeas court. *See* 28 U.S.C. § 2254. If the default is ruled inadequate, however, the federal court is free to address the claim without deference.

procedural one. Such a ruling is subject to federal review – not because the ruling was unfair, but because it was, in effect, on the merits of a federal claim.

The Court has made this clear from the beginning. Possibly the first case to speak on the adequacy question was *Chapman v. Goodnow's Administrator*, 123 U.S. 540 (1887). There the Court noted that it was not reviewing the merits of the ground that was dispositive below, because it was not a federal question. "All we have to consider is, whether it was the *real ground of decision*, and not used to give color only to a refusal" to decide the federal claim presented. 123 U.S. at 546-47 (emphasis supplied). "[A] right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action." *Id.* at 548. *See also Rogers v. Alabama*, 192 U.S. 226, 231 (1904) (relying on *Chapman* language).

The Court has continued into modern times to refer to such evasion as the essence of an inadequate state ground. *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) (federal claim "cannot be evaded"); *Williams v. Georgia*, 349 U.S. 375, 383 (1955) (we must decide "whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right"); *Wolfe v. North Carolina*, 364 U.S. 177, 195 (1960) (where state ground not adopted in order to evade constitutional issue, this Court accepts decision, right or wrong); *Hathorn v. Lovorn*, 457 U.S. 255, 265 n.15 (1982) (state court ruling reviewable because it either decided merits of federal question or invoked procedural rule to avoid federal question).

Thus evasion of a federal ruling *is* a federal ruling. In rare cases the Court has an actual indication of evasion in the form of discriminatory refusal to adjudicate the federal claims of a disfavored litigant.[20] Generally, however, it would be difficult or impossible to determine directly whether a particular state default ruling is the product of hostility to the underlying federal claim.[21] Accordingly, the Court's

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[20] *Compare NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 456-57 (1958) (state ground inadequate where same procedural rule was applied with opposite result to identical federal claim raised by Ku Klux Klan), *with Walker v. City of Birmingham*, 388 U.S. 307, 319-20 (1967) (no inadequacy where state court applied procedural rule in identical manner against civil rights group and white supremacist group); *see also Michel v. Louisiana*, 350 U.S. 91, 101-02 (1955) (no evidence that state rule applied differently against blacks and whites; otherwise "we might have a very different case here").

[21] Although there is no possible suggestion of any such hostility in this case. The Pennsylvania Supreme Court regularly reviews, on the merits, the federal claims on which the federal court of appeals granted relief to Kindler: an alleged violation of *Mills v. Maryland*, 486 U.S. 367 (1988); and a claim of ineffective presentation of mitigation evidence at sentencing. Indeed, the state court has itself granted relief on *Mills* claims to at least four capital defendants, *Commonwealth v. Begley*, 780 A.2d 605, 644-45 (Pa. 2001); *Commonwealth v. Young*, 572 A.2d 1217, 1228-29 (Pa. 1990); *Commonwealth v. Billa*, 555 A.2d 835, 844 (Pa. 1989); *Commonwealth v. Chambers*, 807 A.2d 872, 881-83 (Pa. 2002) (counsel ineffective for failing to raise *Mills* claim), and has granted or upheld mitigation ineffectiveness relief on at least a dozen occasions, *Commonwealth v. Gorby*, 909 A.2d 775, 788-92 (Pa. 2006); *Commonwealth v. Zook*, 887 A.2d 1218, 1230-35 (Pa. 2005); *Commonwealth v. Malloy*, 856 A.2d 767, 784-88 (Pa. 2004); *Commonwealth v. Ford*, 809 A.2d 325, 330-34 (Pa. 2002); *Commonwealth v. Smith*, 675 A.2d 1233-35 (Pa. 1996); *Commonwealth v. Perry*, 644 A.2d 705, 709 (Pa. 1994);

adequacy case law functions as a prophylactic means of ensuring against evasion. The purpose of the prophylactic is not to police the state courts' procedural rulings, but to distinguish between federal and genuinely state grounds. The former are subject to review; and the latter are binding, right or wrong.

B. Reasonable Notice.

Given these parameters, "[t]he most workable of all the general tests is found in the requirement that state courts afford a reasonable opportunity to assert federal rights, without placing unreasonable obstacles in the way." 16B WRIGHT & MILLER,§ 4027, at 392. The Court has offered a number of stock phrases to denote inadequacy, without defining their interrelationship. This one simple idea of reasonable notice and opportunity encompasses them all. If a litigant has reasonable notice of a state procedural requirement and reasonable opportunity to meet it, then there is no legitimate concern that the rule was trumped up to frustrate federal rights. The default is the litigant's doing, not the product of discrimination.

Commonwealth v. Williams, 950 A.2d 294, 300-05 (Pa. 2008); *Commonwealth v. Sattazahn*, 952 A.2d 640, 656-57 (Pa. 2008); *Commonwealth v. Sneed*, 899 A.2d 1067, 1077-84 (Pa. 2006); *Commonwealth v. Jones*, 912 A.2d 268, 291-94 (Pa. 2006); *Commonwealth v. Collins*, 888 A.2d 564, 579-84 (Pa. 2005); *Commonwealth v. Moore*, 860 A.2d 88, 98-100 (Pa. 2004).

To be sure, the state supreme court does not grant such relief quite as regularly as the local federal habeas courts, which have overturned virtually every Pennsylvania capital sentence they have adjudicated. But if that is any evidence of hostility, it is not on the part of the state courts.

Many of the Court's adequacy cases, from early on, sound this theme fairly explicitly. There is nothing in the adequacy doctrine "which justifies this Court in ignoring or setting aside a required form of practice . . . if the practice gives to the litigant a reasonable opportunity to have the issue as to the claimed right heard and determined by [the state] court." *Central Union Telephone Co. v. City of Edwardsville*, 269 U.S. 190, 194-95 (1925).[22]

But other rubrics used by the Court really amount to the same thing. "Arbitrariness," for example, *see Staub v. City of Baxley* 355 U.S. 313, 320 (1955), "novelty," *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958), and "retroactiv[ity]," *see Ford v. Georgia*, 498 U.S. 411, 424 (1991), all suggest a rule or ruling from out of left field. And the Court's most often-quoted comment on inadequacy, *see Davis v. Wechsler*, 263 U.S. 22, 24 (1923) ("Whatever springes the State may set . . ."), provides another example: a "springe" is a trap or snare intended to catch by surprise. WEBSTER'S NEW INTERNATIONAL DICTIONARY 2441 (2nd ed. 1950).

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[22] *See also Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 681-82 (1930) (state ground inadequate where newly announced rule gave defaulted party no opportunity to present claim); *Parker v. Illinois*, 333 U.S. 571, 575 (1948) ("petitioner plainly had a reasonable opportunity to have his federal questions passed upon by the state court"); *Reece v. Georgia*, 350 U.S. 85, 89 (1955) (state rule of practice "presupposes an opportunity to exercise that right"); *Michel v. Louisiana*, 350 U.S. 91, 93 (1955) (the test is whether the defendant had reasonable opportunity to have federal issue heard by state court); *Walker v. City of Birmingham*, 388 U.S. 307, 319 (1967) (state practice gave litigant "fair notice" of its existence).

That lack-of-notice notion is similarly present in the "firmly established" cases, in their various permutations: *e.g.*, "strictly or regularly followed," *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964); not "irregularly" applied, *Hathorn v. Lovorn*, 457 U.S. 255, 265 (1982); "firmly established and regularly followed," *James v. Kentucky*, 466 U.S. 341, 348 (1984); "consistently or regularly applied," *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988). *Barr* in particular makes the point: it was a companion case to *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964), which described inadequate state grounds as "unforeseeable" judicial constructions that give litigants no warning. Thus the same day the Court first used the phrase "strictly or regularly followed," it was careful to define inadequacy in terms that are actually more like reasonable notice.

It is time to boil things down. The difficulty with all these formulations floating around is that they are often treated as formal legal tests. If they really are tests, then how many are there, and how do they relate to each other? Is "firmly established" different than "consistently applied?" If a rule followed in the "vast majority" of cases is adequate, what about a rule invoked less often?

Questions like these have led the lower courts into a wild-goose chase. Many attempt to engage in a complete canvass of every state case or order issued under a particular practice or procedure. Dozens of decisions may have to be reviewed – both published

and unpublished – to see how the state courts are "really" applying the rule.[23]

These angels-on-pinhead inquiries are not just onerous; they are intrusive. They inevitably put the federal court into the position of second-guessing the state court's judgments down to the smallest detail. How else to decide if the state court is acting inconsistently over an entire run of cases, without looking at every fact that might properly distinguish one of those cases from another?

The same problems arise with the "legitimate state interest" language sprung upon the law by *Henry v. Mississippi*. Of course no legitimate state interest is served by a state rule that is patently arbitrary, or pointlessly severe, or plainly untenable. But that is a truism. "Legitimate state interest" adds nothing to any of these questions. A discriminatory state ruling is inadequate whether or not it is also labeled as against the state's interest. Standing alone, *Henry* untethered is just an invitation to substitute one judge's views for another's.

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[23] *See, e.g., Powell v. Lambert*, 357 F.3d 871, 875-79 (9th Cir. 2004) (examining published and unpublished state court opinions to determine "actual practice"; "unpublished decisions are a particularly useful means"; burden of proving consistency is on the state); *Crawford v. Minnesota*, 498 F.3d 851, 854-55 (8th Cir. 2007) (reviewing at least a dozen state court decisions); *Wright v. Quarterman*, 470 F.3d 581, 587-88 (5th Cir. 2006) (reviewing over 30 state court decisions); *Franklin v. Anderson*, 434 F.3d 412, 420-21 (6th Cir. 2006) (reviewing almost 40 state court decisions); *Spears v. Mullin*, 343 F.3d 1215, 1254 (10th Cir. 2003) (reviewing unpublished decisions).

The best solution is a single test based on reasonable notice and opportunity. *Lee v. Kemna* illustrates the value of that approach. While the *Lee* Court relied on nomenclature from a number of prior adequacy decisions, the factors relevant there fit even more cleanly within the standard suggested here.

In that case the state court found that a criminal defendant had failed to preserve his request for a continuance when witnesses suddenly vanished in the middle of a trial, because he did not formally write out the request with reasons stated. The procedural rules in question, however, appeared, on their face, to apply to pre-trial motions, not emergency mid-trial requests; no prior precedent suggested otherwise, nor did the trial judge or the opposing party; and the litigant had already made the necessary points to the court, without any way to know that he was supposed to repeat them all over again in order to preserve his claim. *See* 534 U.S. at 387. Thus he did not have reasonable notice of the requirements held against him, or a reasonable opportunity to meet them.

That should be the test. It provides federal courts some assurance that the default is real, and state courts some assurance that they can set their own rules of practice. That is the whole task of the adequate state grounds doctrine.

C. Certitude.

One last point about the standard must be emphasized. Reasonable notice does not mean certitude. If you ignore a *likely* consequence of non-compliance because it is not the *only possible* consequence, you are still responsible for your default.

The adequate state grounds doctrine is not a federal insurance program for reckless litigants.

That is a point that the court of appeals got very wrong. In the court's view, "the state rule must speak in unmistakable terms." If not, then it is inadequate and may be disregarded on federal review. Cert. App. 20. But few if any rules are "unmistakable" – no more so in federal court than in the states. The terms in which the rule should speak are those that would permit "ordinarily competent attorneys [to] secure determination of the right" in question. 16B WRIGHT & MILLER, § 4027, at 386-87.

This Court has addressed the matter in prior adequacy cases. In *Central Union Telephone Co. v. City of Edwardsville*, 269 U.S. 190 (1925), the litigant complained about a state statute requiring a particular method of preserving constitutional claims. The argument was that the statute had previously been applied only to state constitutional claims; this was the first case in which the rule had been held applicable to federal constitutional claims as well.

Although the statute might reasonably have been construed either way, this Court rejected the claim of inadequacy. The state court's interpretation was not "forced or strained . . . . When so declared by the state court it should bind us unless so unfair or unreasonable in its application to those asserting a federal right as to obstruct it. This is no such case." 269 U.S. at 195. *See also Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 682 n.9 (1930) ("Had there been no previous construction of the statute by the highest court, the plaintiff would, of course, have had to assume the risk that the ultimate

interpretation by the highest court would differ from its own").

Courts of appeals have made the same point more recently, for example in applying the new deadline for filing habeas corpus petitions. "The petitioners' argument that the deadline was unclear also makes no sense, because if it was unclear, they should have filed by the earliest possible deadline, not the latest." *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000).[24]

That rationale applies here as well. If state law reasonably calls for certain conduct, and offers a reasonable way to carry it out, then responsible litigants do not take a chance. They just do it. Those

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[24] *See Lattimore v. DuBois*, 311 F.3d 46, 54 (1st Cir. 2002) ("[w]rong guesses, even reasonable ones, as to precisely how a new statute of limitations will be authoritatively applied do not entitle a disappointed petitioner to relaxation of rules once adopted"); *Flores v. Quarterman*, 467 F.3d 484, 486-87 (5th Cir. 2006) (legitimate uncertainty about proper filing date did not justify lateness; "Flores should have elected to err on the side of caution and abide by the earlier of the two possible deadlines"); *see also United States v. Herrera*, 584 F.2d 1137, 1149 (2nd Cir. 1978) ("All the Due Process clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden, and thus not lull the potential defendant into a false sense of security, giving him no reason even to suspect that his conduct might be within its scope"); *United States v. Thomas*, 864 F.2d 188, 195 (D.C. Cir. 1988) ("courts do not require . . . that a person contemplating a course of behavior know with certainty whether his or her act will be found to violate the proscription"); *DiCola v. FDA*, 77 F.3d 504, 509 (D.C. Cir. 1996) ("It is therefore fanciful for DiCola to say that he can only 'guess' at the meaning of the [proscription]; he will usually have a pretty good idea").

who do not should not be able to claim refuge under the adequacy doctrine.

III. Kindler had more than reasonable notice that his flight "remedy" would jeopardize his legal remedies.

Under the proper standard, the adequacy of the default ruling here is evident. Kindler did not need an engraved invitation requesting the pleasure of his continued presence in this country. Existing law was enough to advise him that he better stay in his cell if he wanted to challenge his sentence through the courts. Kindler simply chose a different avenue of relief, and kept choosing it at every chance.

Kindler has argued, and the court of appeals agreed, that the adequacy of Pennsylvania's fugitive forfeiture rule must be assessed as of the time of the default, Cert. App. 21, which occurred "[w]hen Kindler escaped in 1984," Cert. App. 23. That is correct as far as it goes. The law should provide reasonable notice of its requirements before a litigant does something to violate them.

But at this point in their analysis, Kindler and the court below engage in a subtle anachronism. They assess the state of the law in 1984 as it applied to a *former* fugitive – one who has already been returned to custody. That is a status that Kindler did not achieve until *1991*. At the time of his 1984 default, he obviously *was not* a former fugitive and, as far as he could help it, he was *never going to be* a former fugitive. He fled to Canada, went to extreme lengths to break out of prison a *second* time, and then fought

extradition for years before he was dragged back within the jurisdiction of Pennsylvania courts.

So the notice to which Kindler was reasonably entitled at the time of his default was notice about the consequences of *escape*, not apprehension. That was a simpler question, and the law provided an (inescapably) clear answer. Pennsylvania cases, relying on over a century of decisions of this Court, have consistently refused to entertain challenges to a judgment of sentence by a fugitive who is still at large.[25] In 1984, that was all Kindler needed to know. It did not matter that his (double) escape efforts might eventually fail, because *reasonable* notice does not include caveats about contingencies that Kindler had no intention of ever facing.[26]

In any event, Pennsylvania's fugitive forfeiture rule was plainly adequate as applied to Kindler even if he were viewed, retroactively, as a "former" fugitive. As noted, Pennsylvania law at the time provided that, if

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[25] *See, e.g., Commonwealth v. Galloway*, 333 A.2d 741, 743 (Pa. 1975); *Commonwealth v. Barron*, 352 A.2d 84 (Pa. Super. 1975); *Commonwealth v. Tomlinson*, 354 A.2d 254 (Pa. 1976); *Commonwealth v. Albert*, 393 A.2d 991 (Pa. Super. 1978); *In the Interest of Dixon*, 422 A.2d 892 (Pa. Super. 1980); *Commonwealth v. Harrison*, 432 A.2d 1083, 1085-86 (Pa. Super. 1981); *Commonwealth v. Clark*, 446 A.2d 633, 634 (Pa. Super. 1982); *Commonwealth v. Passaro*, 476 A.2d 346 (Pa. 1984).

[26] *See Michel v. Louisiana*, 350 U.S. 91, 98-99 (1955) ("We do not believe that the mere fugitive status existing here excuses a failure to resort to Louisiana's established statutory procedure available to all who wish to assert claimed constitutional rights.... [The defendant], by his own action, failed to avail himself of Louisiana's adequate remedies").

an escaped convict was recaptured during the post-verdict stage, the trial court had discretion to dismiss post-verdict motions or decide them on the merits. Accordingly, the flight rule did not dictate unequivocal results in individual cases.

But reasonable notice does not require that it must. The only notice Kindler needed was notice sufficient to alert a prudent person to avoid the default. Kindler, of course, could easily have done so, by the simple expedient of not sawing through that prison bar, and not climbing down that thirteen-story rope he made out of bedsheets.

Kindler failed to take these steps not because the state rule was inadequate in spelling out exact outcomes, but because he made his own choice of remedies. He knew at the time of his first escape that the trial judge could dismiss his post-verdict motions, and he knew at the time of his second escape that the trial judge *had* dismissed his post-verdict motions. But he also "knew there was no death penalty" up there in Canada, and that was the form of relief he decided to seek. It almost worked.[27]

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[27] As the Third Circuit itself observed in a related context concerning Pennsylvania's fugitive forfeiture rule,

> "Feigley does not contend that he escaped with an intention to return in the future and in reliance on [state law] resubmit his claims to the Pennsylvania courts. Moreover, . . . it is not necessary that the petitioner have knowledge of the precise impact of his decision to escape. It is enough that he obviously knew that by attempting an

Yet Kindler insists he should not be held to the consequences of his decision. He argues that he could not have known he would forfeit claims by escaping (twice), because two other Pennsylvania capital defendants also escaped during the 1980's, and their claims were heard on the merits. *See* Brief in Opp. at 17 n.11.

The disposition of these other cases, however, could not possibly have influenced Kindler's own determination to flee. The decisions reviewing those cases on the merits came years *after* Kindler's (two) escapes. *Commonwealth v. Lewis*, 567 A.2d 1376, 1378 n.1 (Pa. 1989); *see also Commonwealth v. Lewis*, 598 A.2d 975 (Pa. 1991); *Commonwealth v. Yarris*, 549 A.2d 513 (Pa. 1988); *see also Commonwealth v. Yarris*, 731 A.2d 581, 584 (Pa. 1999).

In any case, the whole point of a flexible, discretionary standard for fugitive forfeiture is that it takes account of individual circumstances, circumstances that Kindler neglects to flesh out. Reginald Lewis, the first defendant in question, was gone for less than *two weeks*.[28] He was found in an adjacent state, before he could leave the country, at which point the prosecution withdrew its motion to quash his appeal. The entire brief period of his absence occurred after the appeal had been timely filed

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escape which he hoped would be permanent, he was deliberately bypassing the entire legal system."

Feigley v. Fulcomer, 833 F.2d 29, 32 (3rd Cir. 1987).

[28] Robert J. Terry, "*FBI Arrests Escapee of Death Row*," PHILA. INQUIRER, October 2, 1984, at B4.

and long before it was scheduled for argument. Nicholas Yarris, the other defendant, was at liberty for less than a month.[29] He also did not leave the country, and his short absence served only to delay a hearing that he had requested. Kindler had no right to assume that, in the circumstances of his case, he would be treated as leniently as these other two.

But there was also a fourth man, not mentioned by Kindler. Roger Judge was a capital defendant who escaped (on his second try) in 1987. Like Kindler, he succeeded in getting across the border to Canada. He spent the next *eleven years* there, committing new crimes, serving time, and fighting extradition to the United States. And like Kindler, Judge's legal claims were deemed forfeited while he was at large, and the default was upheld after his capture. *See Commonwealth v. Judge*, 609 A.2d 785 (Pa. 1992); *Commonwealth v. Judge*, 797 A.2d 250 (Pa. 2002).[30]

These are not circumstances that give any weight to Kindler's claim of inadequacy. He knew what he was doing, and he did it anyway. If he was never caught, his sentence was self-vacated. If he was caught, there was no way to punish him with prison time, because he was already facing execution. The

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[29] Joanne Sills, "*Cops Hunt Escaped Murderer*," PHILA. DAILY NEWS, February 16, 1985, at 5; "*Pennsylvania Fugitive Arrested for Car Theft in Daytona Beach*," OCALA (FLA.) STAR-BANNER, March 14, 1985, at 3B.

[30] Judge is now in federal habeas court, represented by the same counsel as Kindler. He is attacking *his* forfeiture as inadequate, bolstered, of course, by the Third Circuit's ruling in this case. *See Judge v. Beard*, 611 F. Supp. 2d 415 (E.D. Pa. 2009).

only potential consequence was forfeiture and, once the federal habeas courts took care of that by annulling the default as "inadequate," the remaining result of Kindler's flight was to provide him the benefit of relief on a legal claim, *see Mills v. Maryland*, 486 U.S. 367 (1988), that did not exist at the time of his escape.

Kindler contends that he might have received application of *Mills* in any case. He points to a handful of Pennsylvania capital appeals that took many years to resolve, and speculates that, had he not fled, his direct appeal just might have dragged on long enough – from 1984 until 1988 – to bring him within the new rule established by *Mills*. *See* Brief in Opp. at 21.

In reality, however, the vast majority of Pennsylvania capital appeals decided during the period of Kindler's flight took considerably less than fours years to resolve[31] In the normal course, his case would have been over and done with, and the judgment final, well before he could take advantage of

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[31] *See, e.g., Commonwealth v. Lark*, 543 A.2d 491 (Pa. 1988) (25 months); *Commonwealth v. Holland*, 543 A.2d 1068 (Pa. 1988) (26 months); *Commonwealth v. Crawley*, 526 A.2d 334 (Pa. 1987) (23 months); *Commonwealth v. Jermyn*, 533 A.2d 74 (Pa. 1987) (18 months); *Commonwealth v. Clayton*, 532 A.2d 385 (Pa. 1987) (18 months); *Commonwealth v. Fahy*, 516 A.2d 689 (Pa. 1986) (35 months); *Commonwealth v. Frey*, 517 A.2d 1265 (Pa. 1986) (25 months); *Commonwealth v. Griffin*, 515 A.2d 865 (Pa. 1986) (22 months); *Commonwealth v. Cross*, 496 A.2d 1144 (Pa. 1985) (38 months); *Commonwealth v. Pursell*, 495 A.2d 183 (Pa. 1985) (16 months); *Commonwealth v. Morales*, 494 A.2d 367 (Pa. 1985) (19 months); *Commonwealth v. Beasley*, 479 A.2d 460 (Pa. 1984) (25 months).

this new development in the ever-developing law of capital litigation.

Mills in itself, moreover, was not the only blessing that Kindler secured with his flight. By relocating abroad, and then receiving a pass on what should have been a forfeiture of his claims in state court, Kindler was also able to obtain *de novo* review of both his *Mills* claim and his mitigation ineffectiveness claim. *See* 28 U.S.C. § 2254(d). Yes, the state could have avoided that fortuity – but only by giving the prisoner a pass to begin with and reviewing his claims on the merits, as if nothing had happened, as if he had not sawed his way out of his Philadelphia prison cell, as if he had not climbed his way out of his Montreal prison cell, as if he had not argued to every Canadian court and even to the United Nations that he should *never* be returned to this country to face his sentence.

The adequate state grounds doctrine should not be understood to require such an outcome. Reasonable notice of the state rule was provided, and a reasonable opportunity to comply with it. That should be enough for adequacy.

Conclusion

For these reasons, petitioners respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Third Circuit, and deny the petition for writ of habeas corpus.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Constitution, Amendment VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

28 U.S.C. § 2254. State Custody; Remedies in Federal Courts:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that --

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that --

(A) the claim relies on --

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable

to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

RESPONDENT'S BRIEF

No. 08-992

AUG 3 1 2009

In The
Supreme Court of the United States

JEFFREY A. BEARD, Secretary,
Pennsylvania Department of Corrections, et al.,

Petitioners,

v.

JOSEPH J. KINDLER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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QUESTIONS PRESENTED

In the Court of Appeals, the Commonwealth asserted that the fugitive-forfeiture procedural bar which the Pennsylvania courts applied in Respondent Kindler's case was an adequate bar because it was "mandatory," *i.e.*, the state courts had no discretion to review his case. The Court of Appeals rejected the Commonwealth's mandatory-bar argument, and held that the bar the state courts applied was not "firmly established and regularly applied" at the times relevant to Kindler's case. Therefore, the bar was not adequate to preclude federal review.

In this Court, the Commonwealth alters its position. Now the Commonwealth asserts that the fugitive-forfeiture bar was "discretionary," not "mandatory," and argues that the Court of Appeals held that a procedural bar which is in any degree "discretionary" is an inadequate bar. The Commonwealth does not define "discretionary" in its Question, and the text of its brief assigns a meaning to the term "discretionary" that bears little resemblance to what the Court of Appeals actually decided. Respondent submits that the appropriate questions this Court should address are these:

> *When a state court makes a procedural bar ruling in the absence of a firmly established and consistently applied procedural bar rule, is the ruling adequate to foreclose federal habeas review?*

QUESTIONS PRESENTED – Continued

When a state changes from a discretionary practice – where discretion frequently was exercised to excuse a default – to one in which the default constitutes a forfeiture, and then retroactively applies the forfeiture rule, is the forfeiture rule adequate to foreclose federal habeas review?

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STATEMENT OF THE CASE

After the jury's death verdict and before formal sentencing, Respondent Joseph Kindler fled to Canada. He was apprehended, returned to Pennsylvania and sentenced by the court. He sought to have issues heard in the trial court and on direct appeal. The practice of the Pennsylvania Supreme Court in capital cases at that time was to review the merits of direct appeal issues, regardless of procedural bars. In non-capital fugitive cases, its practice was to review the merits if the defendant, like Kindler, was back in custody before the appeal had been dismissed. However, the Pennsylvania Supreme Court refused to review Kindler's issues because he fled.

Kindler sought post-conviction review. He raised a new collateral issue – ineffective assistance of counsel at capital sentencing. The practice of the Pennsylvania Supreme Court in capital cases at that time was to review the merits of post-conviction issues, regardless of procedural bars. In non-capital fugitive cases, its practice was to permit post-conviction review in cases where the defendant had fled but was later returned to custody. However, the Pennsylvania Supreme Court refused to review Kindler's post-conviction issues because he fled.

The Commonwealth now seeks a ruling foreclosing all review – direct appeal, state post-conviction, federal habeas – for Kindler.

A. Procedural History

Respondent Kindler was convicted of first degree murder and related charges in November 1983. Trial counsel "did not conduct a penalty phase or mitigation investigation." *Kindler v. Horn*, 542 F.3d 70, 84 (3d Cir. 2008) ("*Kindler IV*").[1] The jury returned a verdict of death.

Trial counsel moved for a new trial.[2] Replacement counsel was appointed, and filed supplements, raising trial court error and prosecutorial misconduct issues. JA 29-45.

On September 19, 1984, before formal sentencing and resolution of the post-verdict motions, Kindler escaped from the county jail and fled to Canada. The Commonwealth moved to dismiss the post-verdict motions. JA 45-49. On October 23, 1984, the trial court dismissed the post-verdict motions due to Kindler's escape and "current status as a fugitive from justice." JA 53.

In September 1991, Kindler was returned to Pennsylvania. He moved to reinstate the post-verdict motions. On October 3, 1991, the trial court denied reinstatement, stating Kindler had "los[t] all legal rights and privileges for post-trial motions." JA 58.

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[1] Within quotations, all emphasis is supplied unless otherwise indicated, and internal quotation marks are generally omitted.

[2] In Pennsylvania, these motions are called "post-verdict motions."

The trial court then formally sentenced Kindler to death.

Kindler appealed on October 22, 1991. Because the trial judge had retired, a replacement judge was assigned to write an opinion supporting the court's previous rulings. JA 68.[3] The replacement judge's opinion upheld the original dismissal due to Kindler's fugitive status, *id.*, and also upheld the denial of reinstatement, while indicating that the "better practice would have been to consider the post-verdict motions, particularly in light of the death sentence imposed. . . ." JA 69.

The direct appeal raised trial court errors and prosecutorial misconduct. Kindler also argued that his claims – whether or not preserved – should be reviewed because in capital cases the Pennsylvania Supreme Court "has traditionally permitted a relaxed standard of waiver. . . ." JA 85; JA 93-94 (similar). The court did not review any of Kindler's issues and did not address his "relaxed waiver" argument. *Commonwealth v. Kindler*, 639 A.2d 1 (Pa. 1994) ("*Kindler I*").

Kindler moved for rehearing, arguing that refusing to review his claims "would fly in the face of the reasoning" of *Ortega-Rodriguez v. United States*, 507 U.S. 234 (1993), and that in capital cases, the

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[3] Under Pennsylvania practice, trial judges issue "opinions" supporting their rulings, which are then reviewed on appeal.

Pennsylvania Supreme Court "has always permitted a relaxed doctrine of waiver with respect to the failure to advance claims in post-verdict motions. . . ." JA 135-36. The court summarily denied rehearing. JA 6.

On January 11, 1996, Kindler filed a petition for relief under Pennsylvania's Post-Conviction Relief Act, 42 Pa. C.S. §§ 9541 *et seq.* ("PCRA"). Among other issues, he argued that trial counsel had been ineffective for failing to present available mitigating evidence (one of the two claims upon which the Third Circuit later granted relief). JA 140-52. The Commonwealth moved to dismiss, asserting that Kindler's pre-sentencing flight waived his rights, precluding PCRA review. JA 153-71.

The trial court dismissed the PCRA petition, interpreting the direct appeal decision as a ruling that there was a "waiver of all issues." JA 187. The court also stated that claims not raised on direct appeal were "waived." JA 188 n.2.

Kindler appealed, arguing that there was no connection between his flight and the court's ability to review his post-conviction claims; that the Pennsylvania Supreme Court had "irregularly and inconsistently applied" fugitive-forfeiture; and that refusal to consider his claims "would be inconsistent with" the court's practice of "relaxed waiver in capital cases." JA 201. He also argued that his claim of ineffective assistance of counsel at penalty phase had not been previously litigated or waived. JA 211.

The Pennsylvania Supreme Court affirmed the denial of relief. *Commonwealth v. Kindler*, 722 A.2d 143 (Pa. 1998) ("*Kindler II*"). It stated that Kindler's arguments for review were "previously litigated in his 1994 appeal to this Court," *id.* at 147, and that the relaxed waiver practice did not apply because his "act of becoming a fugitive . . . resulted in the forfeiture of the right to review of those claims." *Id.* at 148 n.13.

Kindler sought federal habeas corpus relief. In the District Court, he argued that the state court rulings were not adequate to preclude federal review both because of Pennsylvania's novel application of fugitive-forfeiture in his case, and because of the Pennsylvania Supreme Court's failure to follow its practice of relaxed waiver in capital cases. JA 300-44. The District Court found the state court fugitive-forfeiture ruling inadequate under *Doctor v. Walters*, 96 F.3d 675 (3d Cir. 1996). *Kindler v. Horn*, 291 F. Supp. 2d 323, 342-43 (E.D. Pa. 2003) (Joyner, J.) ("*Kindler III*"). The District Court therefore did not reach Kindler's arguments concerning the Pennsylvania Supreme Court's relaxed waiver practice. *See id.* at 343 n.7.[4] The District Court granted penalty-phase relief due to Eighth Amendment error under *Mills v. Maryland*, 486 U.S. 367

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[4] In *Lewis v. Horn*, 2006 WL 2338409, *4 (E.D. Pa. Aug. 9, 2006), Judge Joyner held that the state court's failure to follow the relaxed waiver practice rendered its procedural default ruling inadequate.

(1988), and prosecutorial misconduct, while denying relief on other claims.

On appeal, the Third Circuit unanimously affirmed on procedural default and on the *Mills* claim; reversed on prosecutorial misconduct; and held counsel was unconstitutionally ineffective at capital sentencing. *Kindler IV*.

B. Pennsylvania Practice

1. The practice of relaxed waiver in capital cases

In 1978, the Pennsylvania Supreme Court established that it would review the merits of all issues in capital cases, because the "overwhelming public interest" in preventing unconstitutional executions precluded ordinary application of waiver rules. *Commonwealth v. McKenna*, 383 A.2d 174, 181 (Pa. 1978). Under the "duty to transcend procedural rules" in capital cases, "waived" claims were to be addressed on their merits. *Id.* The Pennsylvania courts refer to this practice as "relaxed waiver."[5]

In *Commonwealth v. Zettlemoyer*, 454 A.2d 937 (Pa. 1982), the court reiterated *McKenna*'s broad reach, holding it would not apply waiver rules in capital cases because of the "final and irrevocable

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[5] Pennsylvania law refers to most procedural failings as "waivers," whether or not they involve an affirmative waiver by the defendant.

nature of the death penalty." *Id.* at 955 n.19. Until late 1998, *see infra*, the Pennsylvania Supreme Court's practice was to review the merits of all claims in capital cases, regardless of whether those claims otherwise could be deemed procedurally barred.

Under this relaxed waiver practice, the Pennsylvania Supreme Court reviewed the merits of the issues raised in the vast majority of capital cases: 51 separate decisions, with relaxed waiver often applied to multiple issues in the same case. *See* Attachment to Brief of Respondent (collecting cases). The relaxed waiver practice was applied in direct appeals, initial post-conviction actions and successive post-conviction actions. Bars arising from "waivers" during trial, penalty phase, post-verdict, direct appeal and post-conviction proceedings were consistently not enforced due to this practice. *Id.*

The state court made only narrow exceptions to the relaxed waiver practice: (1) jury-selection claims under *Witherspoon v. Illinois*, 391 U.S. 510 (1968);[6]

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[6] The Pennsylvania Supreme Court stated four times that its relaxed waiver practice did not apply to *Witherspoon* claims. *See Commonwealth v. Jasper*, 610 A.2d 949, 953 n.6 (Pa. 1992); *Commonwealth v. Lewis*, 567 A.2d 1376, 1381 (Pa. 1989); *Commonwealth v. Peterkin*, 513 A.2d 373, 378-79 (Pa. 1986); *Commonwealth v. Szuchon*, 484 A.2d 1365, 1377-80 (Pa. 1984). In every such case besides *Szuchon*, however, the court actually reviewed the waived *Witherspoon* claim on its merits. *See Peterkin*, 513 A.2d at 379; *Lewis*, 567 A.2d at 1380-81; *Jasper*, 610 A.2d at 952-53.

(2) where counsel withdrew an issue;[7] and (3) where the defendant formally waived the right to a direct appeal. In each case in the last category, however, when the defendants subsequently sought post-conviction relief, the Pennsylvania Supreme Court applied relaxed waiver and reviewed the merits of their claims, including claims of trial counsel ineffectiveness. *Commonwealth v. Michael*, 755 A.2d 1274, 1281 (Pa. 2000) (conducting merits review of claims raised post-conviction by petitioner who waived direct appeal); *Commonwealth v. Taylor*, 718 A.2d 743, 746 (Pa. 1998) (similar); *Commonwealth v. Appel*, 689 A.2d 891, 905 (Pa. 1997) (addressing ineffectiveness claims "because of the irrevocable nature of the death penalty").

The Pennsylvania Supreme Court said in Kindler's direct appeal that there were no "allegations of error (direct or collateral) preserved, much like those cases where an Appellant . . . chooses not to raise any issues related to the trial and sentencing hearing. . . ." *Kindler I* at 4. But in post-conviction proceedings, the court treated Kindler quite differently from defendants who formally waived direct appeal. Appel, Taylor, Michael and other defendants who waived direct appeal received merits review of their post-conviction claims, but

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[7] *See Commonwealth v. Gribble*, 703 A.2d 426, 434-35 (Pa. 1997) (counsel withdraws previously filed motion to suppress); *Commonwealth v. Wallace*, 561 A.2d 719, 725 (Pa. 1989) (counsel affirmatively declines cautionary instruction).

Kindler did not. In Kindler's post-conviction proceedings, the court ruled that his claims had been "previously litigated" and determined against him, *Kindler II* at 147, and that he had "forfeit[ed] the right to review of those claims." *Id.* at 148 n.13.

For twenty years following *McKenna*, the relaxed waiver practice was applied to the vast majority of Pennsylvania capital cases. It was applied to review the merits regardless of whether the procedural bar arose from a violation of the rules of appellate or of post-conviction procedure. *See* Attachment to Brief for Respondent. Penalty phase ineffectiveness claims, such as the claim on which the Third Circuit granted relief to Kindler, were reviewed on the merits. The Pennsylvania Supreme Court summed up its relaxed waiver jurisprudence by stating, "[I]t is this Court's practice to address all issues arising in a death penalty case irrespective of a finding of waiver." *Commonwealth v. Morris*, 684 A.2d 1037, 1042 n.11 (Pa. 1996).

Kindler's direct appeal was decided in 1994, during this relaxed waiver era. The briefing in Kindler's post-conviction appeal was completed and the case was submitted for decision on February 27, 1998, while the relaxed waiver practice was in full effect.[8]

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[8] In Pennsylvania, once a case is submitted for decision, no further filings are permitted absent a court order. *See* Pa. R. A. P. 2501(a).

On November 23, 1998, the Pennsylvania Supreme Court drastically changed course in *Commonwealth v. Albrecht*, 720 A.2d 693 (Pa. 1998), holding that despite its prior "practice to decline to apply ordinary waiver rules in capital cases," it would no longer follow that practice in PCRA appeals. *Id.* at 700 (citing *Morris*, 684 A.2d at 1042 n.11). The court explained that it had followed that practice because of the "unique severity and finality of the death penalty," and "to prevent this court from being instrumental in an unconstitutional execution." *Id.* The court complained, however, that the practice "has, in effect, virtually eliminated any semblance of finality in capital cases"; stated that the "benefits of relaxed waiver at the PCRA appellate stage are more than outweighed by the need for finality and efficient use of the resources of this court"; and announced that it would "no longer [apply the relaxed waiver rule] in PCRA appeals." *Id.* In *Kindler II*, decided on December 11, 1998 – less than three weeks after *Albrecht* – the court declined to follow its former relaxed waiver practice. *Kindler II* at 148 n.13.

Post-*Albrecht*, the Pennsylvania Supreme Court continued to follow the relaxed waiver practice in direct appeal capital cases until *Commonwealth v. Freeman*, 827 A.2d 385 (Pa. 2003). *See* Attachment to Brief for Respondent. In *Freeman*, the court revisited the relaxed waiver practice in direct appeal cases, and (as in *Albrecht* for post-conviction cases) abandoned it. *Id.* at 402-03. The court explained that the "relaxed waiver rule became common in direct

capital appeals and has been employed to reach a wide variety of claims." *Id.* at 400. The court further explained that the "relaxed waiver practice has since been routinely employed . . . to reach claims that . . . were not raised *at all* in the trial court." *Id.* at 401 (emphasis in original). Even when abolishing the direct-appeal relaxed waiver practice, then, the Court acknowledged its broad application, and the fact that it was a "routinely employed" "practice" for many years.

In post-conviction cases, following *Albrecht*, the Pennsylvania Supreme Court applied the abolition of relaxed waiver retroactively, thus denying review in cases where review was available under its prior practice.[9] The Third Circuit has found such

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[9] *See, e.g.*, *Commonwealth v. Jones*, 876 A.2d 380, 384 (Pa. 2005) (holding claims procedurally barred under the PCRA because, after *Albrecht*, "the relaxed waiver doctrine is no longer applicable to PCRA appeals"); *Commonwealth v. Brown*, 872 A.2d 1139, 1161-62 (Pa. 2005) (Castille, J., concurring) (*Albrecht* "abrogated relaxed waiver on PCRA review . . . thereby rendering the previously nonwaivable claims defaulted"); *Commonwealth v. Johnson*, 815 A.2d 563, 593 (Pa. 2002) (Eakin, J., concurring and dissenting) (before *Albrecht*'s "abolition of relaxed waiver in PCRA capital appeals" barred claims were reviewed on merits); *Commonwealth v. Wharton*, 811 A.2d 978, 991 n.1 (Pa. 2002) (Saylor, J., concurring) (noting *Albrecht*'s "retroactive abolition of relaxed waiver" and finding it unfair to apply "the more stringent standards subsequently adopted by the Court" in *Albrecht*); *Commonwealth v. Ford*, 809 A.2d 325, 337-38 (Pa. 2002) (Saylor, J., concurring) (before *Albrecht*, relaxed waiver "permitted review of the underlying allegation on its merits" despite procedural bar; since then, a "far more stringent set of rules" has been "implemented by the Court").

retroactive bar decisions to be based upon an inadequate state ground.[10]

Then Circuit Judge, now Associate Justice, Alito addressed this Pennsylvania relaxed waiver practice in *Carpenter v. Vaughn*, 296 F.3d 138 (3d Cir. 2002), and *Bronshtein v. Horn*, 404 F.3d 700 (3d Cir. 2005). He explained that the Pennsylvania Supreme Court did not end its "practice of relaxing waiver rules in death penalty cases until 1998." *Carpenter*, 296 F.3d at 147. Accordingly, there was no adequate bar precluding federal review of Pennsylvania cases from that era, *i.e.*, the *Kindler* era.

In *Bronshtein*, the defendant filed a post-conviction petition, but then waived his right to seek relief. *Bronshtein*, 404 F.3d at 705. His second post-conviction petition was dismissed as untimely. *Id.* at 705-06. Again, Judge Alito explained that although the Pennsylvania time bar appeared to preclude relief, post-conviction bars were not firmly established and generally followed in Pennsylvania capital cases filed prior to *Albrecht*, *i.e.*, during the

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[10] *See, e.g.*, *Bond v. Beard*, 539 F.3d 256, 277 (3d Cir. 2008); *Abu-Jamal v. Horn*, 520 F.3d 272, 287 n.15 (3d Cir. 2008); *Holland v. Horn*, 519 F.3d 107, 115 (3d Cir. 2008); *Laird v. Horn*, 414 F.3d 419, 425 (3d Cir. 2005); *Taylor v. Horn*, 504 F.3d 416, 428 (3d Cir. 2007); *Bronshtein v. Horn*, 404 F.3d 700, 708-10 (3d Cir. 2005); *Jacobs v. Horn*, 395 F.3d 92, 117 (3d Cir. 2005); *Crews v. Horn*, 360 F.3d 146, 153 (3d Cir. 2004); *Carpenter v. Vaughn*, 296 F.3d 138, 147 (3d Cir. 2002); *Szuchon v. Lehman*, 273 F.3d 299, 326 (3d Cir. 2001); *Jermyn v. Horn*, 266 F.3d 257, 278-79 (3d Cir. 2001); *Fahy v. Horn*, 240 F.3d 239, 245 (3d Cir. 2001).

Kindler era. *Id.* at 708-09 (discussing the relaxed waiver history from *McKenna* to *Albrecht*).

In sum, at the times relevant to Kindler's case, Pennsylvania's practice in capital cases was not to apply procedural bars.

2. Fugitive appeals

a. The Pennsylvania Supreme Court's practice in non-capital fugitive cases

The original practice of the Pennsylvania Supreme Court in fugitive cases was to entertain the merits of appeals by defendants who were back in custody at the time of direct appeal, but to dismiss the appeals of defendants who were not in custody during the direct appeal. The basis for this practice was jurisdictional: the appellate court would not hear an appeal from a defendant who was not within its jurisdiction. *Commonwealth v. Galloway*, 333 A.2d 741, 742 (Pa. 1975) (citing *Smith v. United States*, 94 U.S. 97 (1876)); Pa. R. A. P. 1972(a)(6).[11]

In *Galloway*, after the defendant escaped, his post-trial motions were dismissed with prejudice. But the Pennsylvania Supreme Court did not dismiss his direct appeal, because, unlike in cases such as *Smith* and *Molinaro v. New Jersey*, 396 U.S. 365 (1970),

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[11] Rule 1972(a)(6) provides that any party may move to quash an appeal on the grounds that the "appellant is a fugitive."

Galloway had been returned to custody and thus to the court's jurisdiction. *Galloway*, 333 A.2d at 742. The Pennsylvania Supreme Court remanded the case, directing the trial court to consider the merits of the post-verdict motions. *Id.*

Following *Galloway*, the Pennsylvania courts differentiated between (1) cases in which the defendant fled while an appeal was pending, resulting in the appeal being dismissed or quashed, *e.g.*, *In re Dixon*, 422 A.2d 892 (Pa. Super. 1980); *Commonwealth v. Albert*, 393 A.2d 991 (Pa. Super. 1978); *Commonwealth v. Tomlinson*, 354 A.2d 254 (Pa. 1976); *Commonwealth v. Barron*, 352 A.2d 84 (Pa. Super. 1975), and (2) cases in which the defendant fled before appellate proceedings commenced, or was recaptured prior to dismissal of the appeal, resulting in merits review of the appeals and any post-verdict motions. *E.g.*, *Commonwealth v. Milligan*, 452 A.2d 1072 (Pa. Super. 1982) (granting leave to refile post-verdict motions); *Commonwealth v. Borden*, 389 A.2d 633 (Pa. Super. 1978) (same); *Commonwealth v. Harrison*, 432 A.2d 1083, 1085-86 (Pa. Super. 1981) (motion to quash appeal denied where defendant had been recaptured).[12]

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[12] The Commonwealth cites two cases from this era in which leave to refile post-verdict motions was denied: *Commonwealth v. Boyd*, 366 A.2d 934 (Pa. Super. 1976), and *Commonwealth v. Clark*, 446 A.2d 633 (Pa. Super. 1982). No criteria for distinguishing those cases from the ones cited above are set forth in any of the decisions. At best for the

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In *Commonwealth v. Passaro*, 476 A.2d 346 (Pa. 1984), consistent with the first category of cases, the Pennsylvania Supreme Court affirmed dismissal of the appeal of a defendant who escaped while the appeal was pending. *Id.* at 348-49. *Passaro* also added new, "decidedly non-discretionary language," *Doctor*, 96 F.3d at 685, which treated the escape as a forfeiture of appellate rights.

The Third Circuit summarized the Pennsylvania rule from *Galloway* through *Passaro* as follows: "[I]f the defendant is returned to custody while his appeal is pending, an appellate court *has the discretion* to hear the appeal, but if the defendant is returned to custody after the appeal is dismissed an appellate court *lacks the discretion* to reinstate and hear the appeal." *Doctor*, 96 F.3d at 685. In practice, Pennsylvania courts routinely heard the appeals of returned fugitives. *See Milligan*; *Harrison*; *Borden*.

Passaro was decided on May 25, 1984, four months before Kindler escaped on September 19, 1984. There were no clear changes in Pennsylvania fugitive waiver law for several years after *Passaro*. In 1992, after Kindler's 1991 return to custody, sentencing and the filing of his notice of appeal, the Pennsylvania Supreme Court established a new practice of forfeiture of appellate rights:

Commonwealth, the two cases it cites show that the early practice was one of unguided discretion, which was more often exercised to grant review than to deny it.

> A defendant's voluntary escape acts as a per se forfeiture of his right of appeal, where the defendant is a fugitive *at any time after post-trial proceedings commence*. Such a forfeiture is *irrevocable* and continues despite the defendant's capture or voluntary return to custody. Thus, by choosing to flee from justice, appellant *forever forfeited his right to appeal*.

Commonwealth v. Jones, 610 A.2d 439, 441 (Pa. 1992).[13]

The Pennsylvania Supreme Court's practice concerning direct appeals by fugitives may be summarized as follows: Pennsylvania's original rule was jurisdictional. Under *Galloway* (1975), the appeal would be quashed or dismissed only if the defendant was absent from the court's jurisdiction during an appeal. If the defendant was returned to the jurisdiction of the court prior to dismissal of an appeal, the appeal would go forward and there was discretion to hear all issues. *Passaro* (1984) introduced a

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[13] The Pennsylvania Supreme Court's decision in *Jones* affirmed a lower court ruling, *Commonwealth v. Jones*, 564 A.2d 983 (Pa. Super. 1989), which cited *Commonwealth v. Luckenbaugh*, 550 A.2d 1317 (Pa. 1988), to rule that *Galloway* would not be applied. *Jones*, 564 A.2d at 985. *Luckenbaugh* was a per curiam order in which the Pennsylvania Supreme Court reversed a Superior Court decision, citing *Passaro*. Given this history, the Third Circuit concluded that *Galloway* was controlling at the time of Doctor's escape in 1986, since Doctor had been returned to custody before his direct appeal was decided. *Doctor*, 96 F.3d at 685-86.

concept of forfeiture that applied where the jurisdictional rule also applied, *i.e.*, a defendant who is not in custody during direct appeal forfeits direct appeal review, a defendant who is in custody does not. By *Jones* in 1992, however, the forfeiture concept had been expanded to include all appeals involving fugitive defendants, regardless of whether or when the defendant was returned to the jurisdiction.

b. The Pennsylvania Supreme Court's practice in capital fugitive cases

The first capital case presenting the Pennsylvania Supreme Court with a fugitive waiver issue was decided in 1986 and 1988, two years and four years after Kindler's 1984 flight. *Commonwealth v. Yarris*, 518 A.2d 261 (Pa. 1986) ("*Yarris I*") (denying motion to quash appeal); *Commonwealth v. Yarris*, 549 A.2d 513 (Pa. 1988) ("*Yarris II*") (direct appeal opinion reviewing merits of all claims). Yarris' post-conviction appeal was decided in 1999, eight years after Kindler's 1991 return to custody. *Commonwealth v. Yarris*, 731 A.2d 581 (Pa. 1999) ("*Yarris III*") (addressing merits of post-conviction claims). On direct appeal in *Yarris*, the Pennsylvania Supreme Court remanded the case for a post-verdict hearing. *See id.* at 584. Yarris escaped while being transported to that hearing. *Id.* The trial court returned the case to the Pennsylvania Supreme Court, which did not quash the appeal. Yarris was recaptured. The Pennsylvania Supreme Court again remanded the case for the post-verdict hearing. *Yarris I*. The Pennsylvania Supreme Court

reviewed all of Yarris' claims on the merits after the hearing, *Yarris II* at 529 n.2, and later reviewed the post-conviction claims on their merits in *Yarris III*.[14]

Reginald Lewis escaped *with* Kindler, while Lewis' direct appeal was pending. The Pennsylvania Supreme Court declined to quash Lewis' appeal, and reviewed the merits of his direct appeal issues. *Commonwealth v. Lewis*, 567 A.2d 1376, 1378 n.1 (Pa. 1989) (*"Lewis I"*). *Lewis I* was issued before Kindler's direct appeal. Lewis was afforded post-conviction merits review, with no fugitive-forfeiture or other bars applied. *See Lewis I*; *Commonwealth v. Lewis*, 743 A.2d 907 (Pa. 2000) (*"Lewis II"*). Lewis subsequently was granted federal habeas relief due to counsel's ineffectiveness at capital sentencing. *Lewis v. Horn*, 2006 WL 2338409 (E.D. Pa. Aug. 9, 2006) (*"Lewis III"*).

Several months after Kindler's recapture, sentencing and notice of appeal, the Pennsylvania Supreme Court decided *Commonwealth v. Judge*, 609 A.2d 785 (Pa. 1992). Judge escaped shortly after sentencing; he filed a *pro se* notice of appeal while a fugitive, and was still a fugitive at the time his direct appeal was decided. *Id.* at 786. The court treated his fugitive status as a "forfeit[ure of] his right to raise any claims of error." *Id.* at 787.

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[14] DNA testing subsequently exonerated Yarris; charges were dropped, and he was released in 2004. *Yarris v. County of Delaware*, 465 F.3d 129, 134 (3d Cir. 2006).

In the earlier capital cases (*Yarris* and *Lewis*), the court did not directly address the fugitive waiver issue, but instead proceeded to address the merits of all claims. In *Judge*, the court applied the fugitive-forfeiture concept to a capital case where dismissal was consistent with the traditional jurisdictional rule that there would be no appeal when the defendant was not in custody.

c. The Pennsylvania Supreme Court's rulings in *Kindler*

Kindler became a fugitive while his case was in the trial court, and was returned to the jurisdiction before his appeal commenced. The Pennsylvania Supreme Court decided Kindler's direct appeal in 1994. One year earlier, in 1993, this Court decided *Ortega-Rodriguez v. United States*, 507 U.S. 234 (1993), which the Pennsylvania Supreme Court felt constrained to address.

In *Ortega-Rodriguez*, this Court reviewed an Eleventh Circuit decision similar to that of the Pennsylvania Supreme Court in *Jones*, and rejected it. Taking up the question "whether a defendant may be deemed to forfeit his right to appeal by fleeing while his case is pending in the district court, though he is recaptured before sentencing and appeal," *Ortega-Rodriguez*, 507 U.S. at 236, this Court held that appellate dismissal is generally inappropriate for pre-appeal flight, because the justifications for appellate dismissal "all assume some connection

between a defendant's fugitive status and the appellate process," and therefore are "necessarily attenuated when applied to a case in which both flight and recapture occur while the case is pending before the [trial] court. . . ." *Id.* at 244. While this Court left district courts free to fashion an appropriate response to pre-appeal flight, it emphasized that the district courts "can tailor a more finely calibrated response" than the "blunderbuss of dismissal," and that "punishment by appellate dismissal introduces an element of arbitrariness and irrationality" into the sentencing process. *Id.* at 247-48.[15]

Confronted with *Ortega-Rodriguez*, the Pennsylvania Supreme Court struggled to come up with a new rule to justify applying the same sanction to Kindler as it had earlier applied to Judge (who, unlike Kindler, had not been returned to custody at the time of the direct appeal). As Kindler argued in his direct appeal petition for rehearing, *see* JA 134-35, had the Pennsylvania Supreme Court followed *Ortega-Rodriguez*, it would have remanded to the trial court to determine whether there was a sufficient connection between his flight and the trial court's process to justify dismissal without reinstatement of the post-verdict motions, and would not

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[15] On remand, the Eleventh Circuit denied the Government's motion to dismiss and reversed the conviction based on insufficient evidence. *United States v. Ortega-Rodriguez*, 13 F.3d 1474 (11th Cir. 1994).

have applied any fugitive-forfeiture to events that occurred after his recapture, *i.e.*, his formal sentencing, his direct appeal and his post-conviction proceedings.

Instead, the *Kindler I* plurality cited *Passaro* and *Molinaro* for the concept of fugitive-forfeiture, and cited *Ortega-Rodriguez* as approving the concept of trial courts fashioning an appropriate response to the defendant's flight. *Kindler I* at 3. The plurality then created the following rule:

> [O]ur trial courts, when faced with a defendant in fugitive status, . . . have every right to fashion an appropriate response which can include the dismissal of pending post-verdict motions. Our review of that action is limited to determining whether the flight has a connection with the court's ability to dispose the defendant's case and whether the sanction imposed in response to the flight is reasonable under the circumstances.

Id.[16]

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[16] Three of the court's seven Justices joined the plurality opinion, while one did not participate in the decision. The remaining three Justices would all have applied some version of a "compelling reason" rule, allowing a fugitive, following his recapture, to make a showing that his post-verdict motions should be heard. *Kindler I*, 639 A.2d at 8-9 (Cappy, J., concurring); *id.* at 9 (Flaherty, J., concurring). Those Justices concurred in the result on the assumption that Kindler could not

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Applying its newly created procedural rule for the first time, the plurality ruled that the flight was connected to the trial court process and that dismissal of post-verdict motions was reasonable. *Kindler I* at 3-4. This rule did not exist when the trial court dismissed the post-verdict motions, or when it denied Kindler's request to reinstate them. But it enabled the plurality to treat Kindler's appeal, like that in *Judge*, as one that "comes to us without any allegations of error (direct or collateral) preserved, much like those cases where an Appellant either chooses not to raise any issues related to the trial and sentencing hearing or as in those cases where the Appellant is a fugitive during the appellate process." *Id.* at 4 (citing *Commonwealth v. Heidnik*, 587 A.2d 687 (Pa. 1991), and *Commonwealth v. Appel,* 539 A.2d 780 (Pa. 1988)). In fact, however, both Appel and Heidnik (through a next friend) received merits review of their post-conviction claims, and Appel later obtained habeas relief in federal court. *See Commonwealth v. Appel*, 689 A.2d 891, 905 (Pa. 1997) (addressing petitioner's ineffectiveness claims "because of the irrevocable nature of the death penalty"); *Appel*

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make such a showing, though Kindler had never been given the opportunity to do so.

The plurality ignored this Court's approval of district courts applying a "more finely calibrated response" to flight than the "blunderbuss of dismissal," and disapproval of "punishment by appellate dismissal" as introducing an "element of arbitrariness and irrationality into sentencing for escape." *Ortega-Rodriguez*, 507 U.S. at 247-48.

v. Horn, 250 F.3d 203 (3d Cir. 2001) (granting habeas relief).

Then, one year after *Kindler I*, the Pennsylvania Supreme Court abandoned the broad rule of *Jones* altogether. *See In re J.J.*, 656 A.2d 1355, 1362 (Pa. 1995) (plurality overrules *Jones* in favor of rule that appellate court has discretion to reinstate fugitive's appeal upon return to custody); *Commonwealth v. Deemer*, 705 A.2d 827, 829 & n.2 (Pa. 1997) (describing and approving the court's retreat from "absolute rule of forfeiture of appellate rights").

As to post-conviction proceedings, in *Commonwealth v. Huff*, 658 A.2d 1340 (Pa. 1995), the court reviewed a case in which the defendant fled prior to sentencing. The defendant did not appeal, but later filed a petition for post-conviction relief. The Superior Court held that the defendant had waived all of his rights by his flight. The Pennsylvania Supreme Court reversed, holding that the trial court had authority to review post-conviction issues despite the defendant's flight, and that the Superior Court erred when it held that his flight "waived all of his appellate rights, including the right to seek review of determinations in *collateral post-conviction proceedings*. . . ." *Id.* at 1342.

Kindler sought PCRA relief on January 11, 1996. In the PCRA proceedings, he presented *inter alia* a new claim – not raised in the post-verdict motions or on direct appeal – that trial counsel did not adequately investigate and prepare for capital

sentencing. Notwithstanding *Huff*, the trial court denied review and the Pennsylvania Supreme Court ruled that the availability of collateral review "was previously litigated in his 1994 appeal to this Court. . . ." *Kindler II* at 147. The court further asserted that the practice of relaxed waiver in capital cases did not apply because "it was not a procedural default that precluded review of his claims, but rather his own act of becoming a fugitive that resulted in the *forfeiture* of the right to review of those claims." *Id.* at 148 n.13.

In short, when Kindler fled, Pennsylvania practice was to hear appeals by fugitives who were returned to custody before the appeal was dismissed, but Kindler's appeal was not heard. *Kindler I*. The Pennsylvania Supreme Court had held in *Huff* that it was error to apply the fugitive-forfeiture doctrine in post-conviction proceedings where (as in Kindler's case) flight occurred before sentencing. Nevertheless, the court held that the fugitive-forfeiture doctrine precluded consideration of Kindler's post-conviction claims. *Kindler II*.

C. The Third Circuit's Decision

The Third Circuit began by noting that a state court procedural bar ruling is "adequate" to preclude federal habeas merits review only if the procedural bar was "firmly established" and "consistently applied." *See Kindler IV*, 542 F.3d at 78-79 (citing *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991) ("firmly

established and regularly followed"); *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) ("consistently or regularly applied")); *see also James v. Kentucky*, 466 U.S. 341, 348 (1984) ("firmly established and regularly followed"). The Third Circuit held that the decisions in *Kindler I* and *Kindler II* did not meet that standard for the adequacy of a procedural bar.

In the Third Circuit – contrary to its position here – the Commonwealth argued that, when Kindler appealed, the Pennsylvania courts *had no discretion* to consider his claims on the merits. *See Kindler IV* at 79. The Third Circuit rejected that argument, finding that in *Kindler*, as in *Doctor*, the no-discretion fugitive-forfeiture rule "was not 'firmly established' and therefore was not an independent and adequate procedural rule sufficient to bar review of the merits of a habeas petition in federal court." *Id.*

The Third Circuit explained that its analysis was "controlled by our analysis in *Doctor*." *Kindler IV* at 79. Addressing the Commonwealth's argument that the fugitive-forfeiture bar was "mandatory," the Third Circuit noted that in *Doctor*, as in *Kindler*, at the time the defendant fled, Pennsylvania's rule was that its courts "had discretion to hear an appeal filed by a fugitive who had been returned to custody before an appeal was initiated or dismissed." *Id.* (citing *Doctor*, 96 F.3d at 686). Thereafter, this discretionary practice was replaced by a forfeiture or "no discretion" rule. *See Doctor*, 96 F.3d at 681 n.4 (quoting *Jones*, 564 A.2d at 985).

In *Doctor*, as in *Kindler*, this no-discretion rule was not adequate because it was not in place at the time of the default, *i.e.*, the defendant's flight. "[A]t the time of petitioner's escape, . . . it was not 'firmly established' that Pennsylvania courts lacked jurisdiction to hear an appeal first filed after custody had been restored." *Doctor*, 96 F.3d at 685-86.

The Third Circuit then addressed the merits of Kindler's claims. It affirmed the District Court's finding of Eighth Amendment error under *Mills v. Maryland*, 486 U.S. 367 (1988). *Kindler IV* at 80-83. The Third Circuit also concluded that Kindler's appointed counsel provided ineffective assistance at capital sentencing. *Id.* at 84. This was counsel's first capital trial. He acknowledged that he had no experience or training in handling capital cases. He admitted he "did not conduct a penalty phase or mitigation investigation"; failed to request any mitigation records and did not consider a mental health evaluation; and "simply did not think about investigating or presenting evidence concerning family background at the penalty phase." *Id.*

Kindler's jury never heard that: Kindler was raised in a dysfunctional home, with deprivation, neglect, and emotional and physical abuse, which included being beaten "with electrical cords" by his father, leaving him "with welts on his back, and blood showing through his shirt"; Kindler suffers from organic brain damage, including "frontal lobe impairment that can affect judgement, and the ability to control impulsive behavior"; and Kindler has

disorders that cause "significant distress and impairment in Kindler's life," and "constituted an extreme mental or emotional disturbance" at the time of the offense. *Kindler IV* at 84-85. In this Court, the Commonwealth has not challenged the Third Circuit's merits rulings.

SUMMARY OF ARGUMENT

This Court has long applied the adequate state ground doctrine in direct review and habeas cases. Like other federalism doctrines, it maintains a delicate balance. Here, the balance is between potential denial or avoidance of federal review on the one hand, and unwarranted federal intrusion on the other hand. The adequate state ground doctrine is well known to courts and practitioners. It works.

The Commonwealth now proposes a sweeping change in that doctrine. It would replace an entire existing body of law with a deceptively simple "notice and opportunity" approach, although this Court cannot predict the effect of such a change on a wide variety of federal rights and state procedures.

There is no real support for the notion that such a change is needed. Petitioners provide no explanation of how "notice and opportunity" would prevent rarely, inconsistently applied state procedural rules from being used to thwart review of violations of federal rights. Congress did not adopt the Commonwealth's approach when it enacted sweeping changes to federal habeas procedures in 1996.

The Commonwealth also asks this Court to overrule the Third Circuit's finding that the state bar at issue was not adequate. Contrary to the Commonwealth's misreading of *Kindler IV* and other relevant Third Circuit precedents, the Third Circuit did not hold in *Kindler IV*, nor has it ever held, that all "discretionary" state rules are inadequate. Rather, the Third Circuit concluded that Pennsylvania's changing practices in fugitive cases demonstrate that there was no firmly established and regularly applied state bar rule. The Third Circuit's holding is fully consistent with this Court's adequate state ground precedents, and that should be the end of the matter.

This Court's precedents demonstrate that labels like "discretionary" and "mandatory" are far less important than actual state court practice. "Discretionary" rules that are rarely or inconsistently enforced in practice will likely be inadequate, because they can easily be used against disfavored litigants, or to treat similarly situated litigants differently. "Discretionary" rules that are usually enforced in practice will likely be adequate regardless of occasional acts of grace. Given Pennsylvania's shifting approaches to fugitive-forfeiture, the bar applied here was not adequate to foreclose federal review under this Court's precedents.

The Third Circuit's ruling is also supported by an alternative ground that Kindler raised in the District Court, Third Circuit and Brief in Opposition to certiorari review, but which the District Court and Third Circuit did not need to address in light of their

holdings that the fugitive-forfeiture bar was inadequate. For twenty years, the Pennsylvania Supreme Court had a practice of relaxed waiver in capital cases. While that practice was in place, the court consistently reviewed all claims raised by capital defendants in the vast majority of cases, both on direct appeal and in post-conviction, regardless of any "waivers" committed by those defendants. Under any fair understanding of the adequate state ground doctrine, those few capital defendants who, like Kindler, received bar rulings during that era should not be deprived of federal review. If this Court reverses the Third Circuit's fugitive-forfeiture decision, it should remand for adjudication of this issue, rather than dismiss the habeas petition as the Commonwealth requests.

The Third Circuit found Sixth and Eighth Amendment errors. The connection, if any, between Kindler's flight and his ineffective assistance of counsel claim – which had not even been raised at the time of his flight or on direct review – is attenuated at best. The Commonwealth does not challenge the Third Circuit's ruling that Kindler's death sentence is unconstitutional, but seeks a ruling from this Court that he may be executed, effectively without review by any court of the merits of that claim or any other constitutional claim. This Court should decline the Commonwealth's request.

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ARGUMENT

I. THIS COURT SHOULD REJECT THE COMMONWEALTH'S REQUEST TO REPLACE THE ADEQUATE STATE GROUND DOCTRINE.

A. The Adequate State Ground Doctrine

The purpose of the adequate state ground doctrine is to protect federal rights from arbitrary infringement by state courts[17] and ensure uniformity of federal law,[18] while respecting state courts' disposition of state-law issues.[19] In order to be "adequate," a state rule must be "firmly established and regularly followed." *James v. Kentucky*, 466 U.S. at 348-49; *see also Johnson v. Mississippi*, 486 U.S. at 587 ("consistently or regularly applied"). Thus, rules that are novel fail the adequacy test, *see, e.g.*, *Ford v. Georgia*, 498 U.S. at 423 (novel rule not "firmly established and regularly followed"); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958), as do rules that have not been "consistently and regularly applied." *Johnson*, 486 U.S. at 587;

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[17] *See Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1917); *Rogers v. Alabama*, 192 U.S. 226, 231 (1904).

[18] *See Brown v. Western Railway of Alabama*, 338 U.S. 294, 299 (1949); *Murdock v. City of Memphis*, 87 U.S. 590, 631-32 (1875) (discussing importance of uniform construction of federal law).

[19] *See Herb v. Pitcairn*, 324 U.S. 117, 127-28 (1945); *Murdock*, 87 U.S. at 632.

James, 466 U.S. at 346 (rule was "not always clear or closely hewn to"); *Hathorn v. Lovorn*, 457 U.S. 255, 264 (1982) (state rule was not "strictly or regularly" followed). Even otherwise well-established rules may be inadequate. *See, e.g., Lee v. Kemna*, 534 U.S. 362, 376 (2002) (rule inadequate where "exorbitant[ly] appl[ied]"); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 297 (1964) (rule not previously applied with such "pointless severity").

The adequate state ground doctrine developed as a jurisdictional requirement in direct review cases, while the rationale for its application in habeas proceedings is "grounded in concerns of comity and federalism." *Coleman v. Thompson*, 501 U.S. 722, 730 (1991). For a relatively brief period, this Court permitted review of habeas claims that were subject to a state bar, as long as the petitioner had not "deliberately bypassed" state procedures. *Fay v. Noia*, 372 U.S. 391, 399 (1963). Soon, however, this Court conformed habeas and direct review practice. *See Wainwright v. Sykes*, 433 U.S. 72, 81, 87 (1977) (reinstating adequate state ground doctrine in habeas); *Harris v. Reed*, 489 U.S. 255, 262 (1989) ("*Sykes* made clear that the adequate and independent state ground doctrine applies on federal habeas"); *Coleman*, 501 U.S. at 750.

Coleman explains that applying the same adequate state ground doctrine on direct review and in federal habeas protects the logical integrity of the jurisdictional rationale on direct review – otherwise, federal habeas courts could reach the merits of claims

that this Court could not reach on direct review. Such an "end run" would "undermine the State's interest in enforcing its laws." *Id.* at 731.

Since *Coleman*, this Court repeatedly has reaffirmed that the adequate state ground doctrine applies to direct review and federal habeas cases. *See Lee v. Kemna*, 534 U.S. 362, 375 (2002) ("We first developed the independent and adequate state ground doctrine in cases on direct review from state courts, and later applied it as well in deciding whether federal district courts should address the claims of state prisoners in federal habeas actions");[20] *Cone v. Bell*, 129 S. Ct. 1769, 1780 (2009) (it is "well established" that the independent and adequate state ground doctrine applies in habeas).

B. The Commonwealth's Proposal to Replace the Adequate State Ground Doctrine is Flawed.

The question of the adequacy of a state ground is not unique to habeas cases. The question arises and is governed by the same rules whenever this Court is asked to review any decision of a state court in civil,

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[20] The dissenting Justices in *Lee* agreed that the adequate state ground doctrine applies with "equal force" in habeas proceedings, and that state rules which are not firmly established and regularly followed do not bar habeas relief. *See Lee*, 534 U.S. at 388-90 (Kennedy, J., dissenting).

criminal or administrative proceedings.[21] The Commonwealth proposes that this Court replace this well-established body of law with a "simple" rule of "notice and opportunity." Pet. Br. 29.[22] The Commonwealth proposes that this Court change its longstanding rule in a way that will have sweeping effects across the entire range of litigation affecting federal laws and rights, including many that are not remotely involved in this case.

The proposed transformation of the adequate state ground doctrine into a "notice and opportunity" rule would be a drastic change. "Notice and opportunity" has never been the sole measure of adequacy of a state procedural bar. "Notice and opportunity" is a well-known phrase in constitutional jurisprudence.[23]

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[21] *See, e.g., Osborne v. Ohio*, 495 U.S. 103, 123-25 (1990); *Philadelphia Newspapers, Inc. v. Jerome*, 434 U.S. 241 (1978); *Brown v. Western Railway of Alabama*, 338 U.S. 294, 296 (1949); *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 397-99 (1990); *Film Corp. v. Muller*, 296 U.S. 207, 210-11 (1935).

[22] This Court has disregarded this sweeping proposal twice before when urged by the same amicus that appears for the Commonwealth in this case. *See* Amicus Curiae Brief, Criminal Justice Legal Foundation, *Philip Morris USA v. Williams*, No. 07-1216 (Aug. 20, 2008); Amicus Curiae Brief, Criminal Justice Legal Foundation, *Lee v. Kemna*, No. 00-6933 (July 2001).

[23] *See, e.g., Cole v. Arkansas*, 333 U.S. 196, 201 (1948) ("No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.").

If the decisions that require state procedural rules to be "strictly or regularly followed," had meant to say "notice and opportunity," they would have said so. "Notice and opportunity" is a threshold element of due process.[24] If the cases had meant to say that the test of adequacy of a state procedural bar is whether it violates due process, the cases would have so held.

The Commonwealth's proffered support for its radical request is flimsy. Its proposal is based upon one short passage from a treatise on civil procedure. *See* Pet. Br. 29 (quoting C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE (2d ed. 1996), § 4027 at 392). WRIGHT & MILLER, however, does not suggest the sweeping use of "notice and opportunity" that the Commonwealth now espouses. While WRIGHT & MILLER does praise "fair opportunity to present federal claims" as "the most generally functional test" for one line of adequacy cases, it also recognizes that the "task of judgment" involved in reconciling competing state and federal interests "cannot be discharged by invoking any single phrase, and it is no wonder that various phrases have been used to identify the nature of the inquiry." *Id.*

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[24] *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("elementary and fundamental requirement of due process" is "notice . . . and . . . opportunity" to be heard); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (the "central meaning of procedural due process" is right "to be heard"; in order to "enjoy that right [party] must first be notified.") (quoting *Baldwin v. Hale*, 1 Wall. 223, 233 (1863)).

1. The limitations of "notice and opportunity"

Relying on "notice and opportunity" as the sole test would achieve only a limited portion of the purposes of the adequate state ground doctrine. The historical and conceptual basis for the requirement of consistency in state procedural rulings that bar the merits of federal claims is not merely to provide litigants fair notice but to prevent state courts from declining to enforce federal rights. *See Ward v. Board of County Comm'rs of Love County*, 253 U.S. 17 (1920); *Davis v. Wechsler*, 263 U.S. 22, 24 (1923); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 454-58; *NAACP v. Alabama ex rel. Flowers*, 377 U.S. at 293-01; *Wright v. Georgia*, 373 U.S. 284 (1963); *Ford*, 498 U.S. at 421-25. A rule that exists on paper but is generally not applied may well be used to avoid federal review of disfavored claims or claimants:

> If inconsistently applied procedural rules sufficed as "adequate" grounds of decision, they could provide a convenient pretext for state courts to scuttle federal claims without federal review. The requirement of regular application ensures that review is foreclosed by what may honestly be called "rules" – directions of general applicability – rather than by whim or prejudice against a claim or claimant.

Bronshtein, 404 F.3d at 708 (per Alito, J.).

The Commonwealth pays lip service to the fact that the adequate state ground doctrine is intended in part to prevent a state from avoiding federal review of the claims of a "disfavored litigant." Pet. Br. 28. But its proposal to limit the adequacy inquiry to "notice and opportunity" would allow just that kind of evasion.

2. The significance of consistent state court application of procedural rules

The Commonwealth contends that federal courts should not look at the consistency *vel non* of state court practice and that most of this Court's precedents can be explained under its "notice and opportunity" rule. Pet. Br. 28-32. Neither contention is well founded. In fact, this Court almost always considers the consistency of state court practice in determining whether a state court procedural ruling is adequate.[25] Abandoning consideration of actual

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[25] *See Central Union Telephone Co. v. City of Edwardsville*, 269 U.S. 190, 194-95 (1925) (state appellate rule adequate where state courts had "uniformly held" constitutional claims must be raised in state supreme court); *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958) (state appellate rule required challenge to specific sections of ordinance; rule had not been consistently applied in practice to challenges to entire statutes); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 456 (Court was "unable to reconcile" Alabama court's ruling "with its past unambiguous holdings" and its "consistent" "practice"); *Wolfe v. North Carolina*, 364 U.S. 177, 188-91 (1960) (state court ruling was supported by its "consistent[ ] and repeated[ ]" holdings in

(Continued on following page)

state court practice in favor of a "notice and opportunity" rule would reverse many decisions, both in habeas and direct review cases. For example, in *Staub*, *Flowers*, *Barr*, *Hathorn*, *James* and *Johnson*, the state courts relied on codified or otherwise generally applicable rules. Thus, the petitioners in those cases had notice of the rule and an opportunity to comply with it – but in practice, the state courts had not consistently or regularly relied on the rule to deny review.

The danger that state courts may use arbitrary and inconsistent application of procedural rules to deny federal rights is not a historical curiosity; it

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prior cases, and therefore was adequate); *NAACP ex rel. Alabama v. Flowers*, 377 U.S. at 297 (state appellate rule forbade arguing unrelated errors together; in practice, rule had not previously been applied "with the pointless severity shown here"); *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964) (state court found petitioner violated rule of appellate practice requiring specific exceptions; rule inadequate where, in five other cases, state court had reviewed merits of identical exceptions); *Hathorn*, 457 U.S. at 263 (state court denied issue first raised in rehearing petition as untimely; in practice, state court "regularly" granted similar petitions in past); *James*, 466 U.S. at 348-49 (distinction between "admonitions" and "instructions" on which state court relied was not a "firmly established and regularly followed state practice" although it was included in Kentucky law); *Johnson*, 486 U.S. at 587-89 (ruling that challenge to validity of petitioner's prior conviction should have been raised on direct appeal was not adequate where the "weight of Mississippi law is to the contrary"); *Dugger v. Adams*, 489 U.S. 401, 410 (1989) (post-conviction bar rule adequate because state court applied it in the "vast majority of cases").

remains real. State court judges, who often are elected, are subject to partisan and financial pressures that could lead them to favor or disfavor certain litigants. *See, e.g., Caperton v. A. T. Massey Coal Co.*, 129 S. Ct. 2252, 2257-59 (2009) (describing circumstances in which West Virginia Supreme Court Justice, who received substantial election support from officer of corporation that was subject to award of $50 million in damages, participated in decision reversing the award). It goes without saying that criminal defendants, especially capital defendants, are disfavored litigants in many states. In habeas cases, this Court has very recently rejected as inadequate state court procedural bar rulings that had no fair or substantial support. *See Cone*, 129 S. Ct. at 1780 (state court ruling that claim was "previously determined" "rested on a false premise"); *Lee*, 534 U.S. at 382 (novel application of existing rule to circumstances "Missouri courts had not confronted before").

Indeed, since doing away with its practice of relaxed waiver in capital cases, the Pennsylvania Supreme Court frequently has relied on novel "rules" or novel applications of existing rules to deny merits review in capital cases. *See, e.g., Commonwealth v. Steele*, 961 A.2d 786, 797 n.11, 798-01 (Pa. 2008) (court describes its pleading and briefing rules as "confusing, inconsistent and constantly shifting," but applies them to deny review), *id.* at 838-39 & n.3 (Saylor, J., dissenting) (no meaningful distinction between petitioner's briefing and that in other cases

in which claims were reviewed on merits); *Commonwealth v. Simmons*, 804 A.2d 625, 632-33 (Pa. 2001) (plurality denies merits review of some issues based on a new briefing rule); *id.* at 641-43 (Saylor, J., dissenting) (unfair to apply new briefing rule to defendant after brief was filed); *Simmons v. Beard*, 356 F. Supp. 2d 548, 558 (W.D. Pa. 2005) (at oral argument, Commonwealth conceded state court briefing rule was not firmly established or regularly followed); *see also Commonwealth v. Ford*, 809 A.2d 325, 328 (Pa. 2002) (Saylor, J., concurring) (calling it "unjust" for court to penalize litigants who failed to brief their claims "according to a far more stringent set of rules subsequently implemented by the Court").

The adequate state ground doctrine both protects against state court avoidance of the claims of disfavored litigants, and prevents unwarranted federal intrusion into matters that are governed by state law. The Commonwealth's demand for drastic changes in that doctrine threatens to upset that balance.

3. Congress has declined to modify the adequate state ground doctrine.

Although Congress enacted sweeping revisions of the habeas statute in the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Congress did not express any intent to modify this Court's established adequate state ground doctrine with one exception (discussed below). In the AEDPA, Congress modified this Court's jurisprudence with respect to: timeliness

of federal habeas petitions, *compare Garlotte v. Fordice*, 515 U.S. 39, 46-47 (1995) (petition may be dismissed on showing of prejudicial delay in filing), *with* 28 U.S.C. § 2244(d) (one year statute of limitations); exhaustion, *compare Rose v. Lundy*, 455 U.S. 509 (1982) ("mixed" petition should be dismissed without prejudice), *with* 28 U.S.C. § 2254(b)(2) (mixed petition may be summarily dismissed on merits); the consequences of a failure to develop facts in state court, *compare Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) (claim may be dismissed for failure to develop facts in state court, absent showing of cause and prejudice), *with* 28 U.S.C. § 2254(e)(2) (to overcome failure to develop, petitioner must show cause and prejudice plus innocence); and the extent of any deference to state court legal rulings, *compare Brown v. Allen*, 344 U.S. 443, 458 (1953) (no deference), *with* 28 U.S.C. § 2254(d)(1) (deferential standard of review).

This Court has applied the adequate state ground doctrine to habeas proceedings since 1977 (*Sykes*). This Court reiterated the adequacy standard many times thereafter.[26] This Court again reiterated in 1991 (*Coleman*) its view that the doctrine applies in habeas proceedings. The AEDPA, passed in 1996, did not alter the established adequate state ground

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[26] *See Ulster County Court v. Allen*, 442 U.S. 140, 148 (1979); *Harris v. Reed*, 489 U.S. 255, 262 (1989).

doctrine, demonstrating no Congressional intent to change the habeas remedy in that regard.[27]

Even more telling is the limited action Congress actually took. In Chapter 154 of the AEDPA, Congress enacted a framework by which states that "opted in" by taking specified actions to improve representation of death sentenced inmates in state post-conviction proceedings would receive benefit in the form of reduced federal habeas review. 28 U.S.C. § 2261 *et seq.*; *see Lindh v. Murphy*, 521 U.S. 320, 328 (1997).[28] One of those benefits was that in such states, a state court bar decision would be upheld in federal habeas unless the claim was not previously available or the State had violated due process – *i.e.*, if the petitioner had lacked "notice and opportunity" in state court. *See* 28 U.S.C. § 2264(a) (in qualifying states, federal court will only consider capital habeas claims that were "decided on the merits in the State courts," with exceptions where the state decision violates the petitioner's constitutional rights or the claim was not previously available); 1 R. HERTZ & J.

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[27] AEDPA did not alter application of existing procedural default principles in non-Chapter 154 jurisdictions, and the lower federal courts have rejected any such suggestion. *See Ortiz v. Stewart*, 149 F.3d 923, 931 (9th Cir. 1998) (Congress did not intend to "abolish pre-AEDPA procedural default law or affect its applicability with regard to states not governed by Chapter 154"); *Truesdale v. Moore*, 142 F.3d 749, 753 n.2 (4th Cir. 1998) (same).

[28] Pennsylvania has not "opted in." *Death Row Prisoners v. Ridge*, 106 F.3d 35 (3d Cir. 1997).

LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 3.3c at 160 (4th ed. 2005) (§ 2264(a) is best understood as a "strict procedural default rule"). The Court should not adopt the Commonwealth's proposed rule where Congress declined to do so.

II. THE STATE COURT FUGITIVE-FORFEITURE RULE WAS NOT FIRMLY ESTABLISHED OR CONSISTENTLY APPLIED; THE THIRD CIRCUIT CORRECTLY FOUND IT WAS NOT ADEQUATE TO PRECLUDE FEDERAL REVIEW.

The Commonwealth contends that Kindler's state court direct appeal and post-conviction proceedings were dismissed under established Pennsylvania rules, and that the Third Circuit wrongly held all "discretionary" bar rules to be inadequate. The Commonwealth errs. The Third Circuit, which was "more familiar than [the United States Supreme Court] with the procedural practices of the States in which [it] regularly sit[s]," *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997), correctly found that the state court bar rulings on direct appeal and post-conviction were not adequate to preclude federal habeas review.

A. The State Court Rulings Were Not "Firmly Established and Consistently Applied."

It is remarkably unclear what rule or rules the Pennsylvania courts applied here. The trial court

dismissed the post-verdict motions on the basis of a non-discretionary rule. JA 68 (trial court believed it was required to deny post-trial motions as long as defendant was fugitive). The trial court then denied reinstatement of the post-verdict motions, apparently applying a rule of unfettered discretion. JA 69 (applying abuse of discretion standard).

On direct appeal, the Pennsylvania Supreme Court plurality said that there was a rule, "applicable to capital cases," that "defendants who are fugitives from justice during the appellate process have no right to any appellate review. . . ." *Kindler I* at 3. The court then recognized that *that* fugitive-forfeiture rule *did not apply* in this case, because Kindler's "fugitive status did not take place during the pendency of an appeal before us." *Id.* Therefore, "the question *becomes* whether the trial court has authority to dismiss such motions as a response to an Appellant's flight." *Id.* After considering this Court's decision in *Ortega-Rodriguez v. United States*, 507 U.S. 234 (1993) – but not adopting the standards set forth therein – the plurality ruled that trial courts have "authority to dismiss" post-verdict motions in "response to an Appellant's flight." *Kindler I* at 3. The plurality then adopted two new criteria for the exercise of that authority – "whether the flight has a connection with the court's ability to dispose of the case and whether the sanction imposed in response to the flight is reasonable under the circumstances." *Id.* The plurality held that Kindler did not prevail under

this new standard, which he had not been given the chance to address in the trial court or on appeal.

In contrast, the concurring Justices stated that Kindler's flight "had little or no direct effect on his appellate rights." *Kindler I* at 8 (Cappy, J., concurring). The concurring Justices nevertheless believed the trial court had both the authority to dismiss the post-verdict motions and also discretion to grant reinstatement of the motions on a showing of a "compelling reason" for doing so. *Id.* The concurring Justices believed Kindler had failed to meet this new standard, *id.*, which had not previously been articulated or applied by the trial court, and which Kindler had been given no opportunity to address.

Then, post-conviction, the Pennsylvania Supreme Court ruled that Kindler "was ineligible for PCRA relief" because his eligibility for such relief "was previously litigated in his 1994 direct appeal." *Kindler II* at 147. In other words, although the question of eligibility for post-conviction relief was not raised or litigated on direct appeal, the court's ruling not only foreclosed review on direct appeal, but also any review in future, as yet uninitiated proceedings. This was inconsistent with the court's ruling in *Huff*, which had held that flight during the direct appeal stage did not preclude post-conviction merits review in proceedings initiated after the defendant was returned to custody. It was also inconsistent with the cases to which the Pennsylvania Supreme Court analogized *Kindler*, where defendants

who formally waived their direct appeals subsequently received merits review in post-conviction proceedings.

Parsing through these rulings, the state courts apparently (a) applied a mandatory rule to dismiss post-verdict motions; (b) applied a rule of standardless discretion to deny reinstatement of post-verdict motions; (c) affirmed the denial of direct review on the basis of two new rules applying different forms of guided discretion; and (d) denied post-conviction review on the ground that the applicability of fugitive-forfeiture to post-conviction proceedings had previously been litigated, even though post-conviction review had not previously been sought.

These rulings are inadequate to bar federal review for reasons similar to those in *Ford v. Georgia*. There, the Georgia courts clarified the proper reading of the Georgia rule regarding the timing for raising a *Batson* objection, doing so in Ford's own appeal. The rule, as so clarified, was a "sensible rule." *Ford*, 498 U.S. at 422. But the adequacy of state rules – even "sensible" rules – "depends on the timely exercise of the local power to set procedure." *Id.* at 423. This Court's adequate state ground precedents require that a state procedural bar "must have been firmly established and regularly followed by the time as of which it is to be applied." *Id.* at 424. Because the rule applied by the Georgia courts was "unannounced at the time of petitioner's trial," it was an "inadequate"

state ground. *Id.* (citing *James v. Kentucky*, 466 U.S. 341 (1984)).[29]

In this case, like *Ford*, neither the guided discretion approach of *Kindler I* nor the irrevocable forfeiture approach applied in *Kindler II* were announced at the time of Kindler's flight, nor even at the time when he sought reinstatement of his post-verdict motions. Even in a non-capital case, then, the rules applied in *Kindler I* and *Kindler II* were not "firmly established and regularly followed by the time as of which [they were] applied."

The lack of adequacy is even more apparent in a capital case. Under Pennsylvania's relaxed waiver practice, the merits were reviewed in capital direct appeal and post-conviction cases regardless of "waivers." Thus, while failure to raise an issue on post-verdict motions would ordinarily "waive" the issue, in capital cases, appellants (like Kindler) could raise and receive review of issues on direct appeal that were "waived" at the post-verdict motions stage. *See* Attachment to Brief for Respondent. The question whether flight at the post-verdict motions stage could act as a "super-waiver" to which the relaxed waiver practice would not apply was neither addressed nor resolved until *Kindler I*. *See Yarris II*, 549 A.2d at 529

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[29] In *James*, the Court held inadequate a ruling barring review on the basis of a distinction between jury admonitions and instructions that was not firmly established and regularly followed. *James*, 466 U.S. at 348-49.

n.2; *Lewis I*, 567 A.2d at 1378 n.1 (both declining to address the waiver question and proceeding to review the merits).

Similarly, as to the post-conviction proceedings, the Pennsylvania Supreme Court had never held prior to *Kindler II* that pre-sentencing flight waived the right to seek post-conviction relief; indeed, it held to the contrary in *Commonwealth v. Huff*, 658 A.2d 1340 (Pa. 1995), which was the law when Kindler filed for post-conviction relief on January 11, 1996. The novel ruling in *Kindler II* denied state court consideration of the ineffective assistance of counsel claim on which the Third Circuit ultimately granted relief. There is no connection whatsoever between Kindler's flight during pre-sentencing/post-verdict proceedings, in which no penalty phase ineffective assistance claim had been raised, and the post-conviction proceedings, in which he raised the claim for the first time.

Even if the rules announced and applied in *Kindler I* and *Kindler II* can be deemed "sensible," a state's announcement and application of new procedural rules that were not previously "firmly established and consistently applied" is not an adequate state ground.

B. The Commonwealth's Attack on the Third Circuit is Flawed.

The Third Circuit correctly held that the rulings in *Kindler I* and *Kindler II* were not adequate to

foreclose federal habeas review because they were neither "firmly established" nor "consistently applied" prior to the announcement of those very decisions. The Commonwealth attacks the Third Circuit's decision as supposedly "interpret[ing] this Court's precedents to compel a finding of 'inadequacy' for any state procedural rule that permits the state courts to exercise a degree of discretion." Pet. Br. 7.

The Commonwealth's attack on the Third Circuit is ironic and erroneous. In the Third Circuit, the Commonwealth asserted that the state court rule was adequate – and that this case was different from *Doctor* – because the state courts supposedly had "no . . . discretion to reinstate Kindler's post-verdict motions. . . ." *See Kindler IV* at 79. Below, then, the Commonwealth contended that the fugitive-forfeiture bar here was "mandatory," not "discretionary." The Third Circuit rejected that argument, explaining that, at the relevant time periods, the state court in *Kindler* "had discretion to reinstate his post-verdict motions," *id.* at 80, just as the state court in *Doctor* had the "discretion to hear an appeal filed by a defendant" whose "flight had ended and custody had been restored before the appellate process was ever initiated." *Doctor*, 96 F.3d at 685-86. The Third Circuit's rejection of the Commonwealth's attempt to distinguish *Doctor* resolved the issue before it. Accordingly, the Third Circuit held: "[U]nder *Doctor*, Pennsylvania's fugitive waiver law did not preclude the district court from reviewing the merits of the

claims raised in Kindler's habeas petition." *Kindler IV* at 80.

Now, the Commonwealth complains that the Third Circuit's focus on whether the state rule was "discretionary" means that the Third Circuit held that all "discretionary" rules are inadequate. But the Third Circuit's focus on "discretion" is an artifact of the inconsistent manner in which the Commonwealth has approached the procedural issues in this case, not a holding that all state rules involving any degree of discretion are inadequate.

1. The Third Circuit's actual decisions in *Doctor* and *Kindler*

The Third Circuit's analysis of the procedural default issue was "controlled by [its] analysis" in the non-capital case of *Doctor v. Walters*. *Kindler IV* at 79. *Doctor* surveyed Pennsylvania's treatment of appeals by fugitives who had been returned to custody, and found that until after the time of Doctor's escape in 1986, Pennsylvania courts *had discretion* to hear an appeal "if the defendant [was] returned to custody while his appeal [was] pending. . . ." *Doctor*, 96 F.3d at 685. By the time Doctor actually appealed, however, Pennsylvania courts "*had 'no discretion* to consider an appeal by a convicted defendant who escapes or absconds from the jurisdiction, regardless of when he returns.'" *Id.* at 681 n.4 (quoting *Commonwealth v. Jones*, 564 A.2d 983, 985 (Pa. Super. 1989)). In 1993, the state appellate court in

Doctor refused to review his claims because the court "believed it lacked the discretion to consider the appeal of a defendant who had fled at any time." *Doctor*, 96 F.3d at 684. Application of that no-discretion rule was inadequate because, at the time of Doctor's flight, "it was not 'firmly established' that Pennsylvania courts lacked discretion to hear an appeal first filed after custody had been restored." *Id.* at 686.

The Third Circuit ruled in *Kindler IV* that the same sequence of events required the same outcome. When Kindler fled in 1984, "the state trial court still had discretion to reinstate his post-verdict motions." *Kindler IV* at 80. Just as in *Doctor*, the state court's practice changed from a discretionary practice of hearing appeals filed after custody was restored to a more restrictive practice. *Id.*

The Commonwealth would have it that *Kindler IV* said the opposite of *Doctor* – that the rule was inadequate *because* it was discretionary. Pet. Br. 12 & n.8. Although the Third Circuit did not spell out its reasoning in *Kindler IV* in the same detail as it did in *Doctor*, it did not need to, because it was applying *Doctor*. *Kindler IV* at 79. The Commonwealth could only be correct about the holding of *Kindler IV* if the Third Circuit misread its own decision in *Doctor*, believing that *Doctor* meant "discretionary rules are inadequate," when it said, "changing from a discretionary rule to a mandatory rule made the mandatory rule inadequate."

Recognizing that *Doctor* undercuts its argument, the Commonwealth now asserts that, in *Lines v. Larkins*, 208 F.3d 153 (3d Cir. 2000), the Third Circuit somehow "made plain its position that a state procedural rule allowing for the exercise of discretion will not be honored in federal court," and that this *Lines*-derived "principle" was applied in *Kindler IV*. Pet. Br. 12 n.13. This contention is meritless.

The Third Circuit did not cite or discuss *Lines* in *Kindler IV*. It relied upon *Doctor*, *Ford v. Georgia*, and *Johnson v. Mississippi*. Further, although Lines did flee the jurisdiction, the Third Circuit's decision in *Lines* did not turn on the adequacy of fugitive-forfeiture, but on whether Lines could show cause and prejudice for his failure to present his claims to the Pennsylvania Supreme Court. *See Lines*, 208 F.3d at 160. In *Lines*, the Third Circuit discussed *Doctor* and fugitive-forfeiture, but it prefaced that discussion by stating that *Doctor* "is neither controlling nor helpful to the present inquiry. . . ." *Id.* at 167. Given that the discussion in *Lines* is pure dicta (on a question that was "neither controlling nor helpful"), it is unsurprising that neither *Kindler IV* nor any other Third Circuit decision has cited *Lines* as an authority on fugitive-forfeiture or even more generally as an authority with respect to the adequate state ground doctrine.

2. The Third Circuit did not hold that all "discretionary" rules are inadequate.

The Third Circuit did not believe that all discretionary rules are *per se* inadequate. For one thing, it said so: "A procedural rule that is consistently applied in the vast majority of cases is adequate to bar federal habeas review even if state courts are willing to occasionally overlook it and review the merits of a claim for relief where the rule would otherwise apply." *Kindler IV* at 79. Indeed, *Campbell v. Burris*, 515 F.3d 172, 181 (3d Cir. 2008), an opinion authored by Judge Stapleton, who was on the panel in *Kindler IV*, *rejected* the "proposition that a state procedural rule is rendered *per se* inadequate merely because it allows for some exercise of discretion by state courts. . . ." *Id.* at 181. As Judge Stapleton explained in *Campbell*:

> The issue is not whether the state procedural default rule leaves room for the exercise of some judicial discretion – almost all do. Rather, the issue is whether, at the relevant point in time, the judicial discretion contemplated by the state rule is being exercised in a manner that lets people know when they are at risk of default and treats similarly-situated people in the same manner.

Campbell, 515 F.3d at 181.

The Third Circuit's approach in *Kindler IV* is actually very similar to its approach a few months earlier in *Campbell*. Here, as in *Campbell*, the Third

Circuit asked whether the state courts were applying a firmly established and consistently applied rule. In both *Doctor* and *Kindler IV*, the Third Circuit found there was no firmly established and consistently applied rule guiding the state court decisions:

> On federal habeas review [in *Doctor*], the Commonwealth argued that the state courts' application of the fugitive waiver doctrine precluded federal habeas relief. We disagreed because the rule was not being consistently or strictly applied when Doctor escaped in 1986. . . . After surveying decisions of Pennsylvania courts we concluded that Pennsylvania courts had discretion to hear an appeal filed by a fugitive who had been returned to custody before an appeal was initiated or dismissed. . . . Accordingly, the fugitive forfeiture rule was not 'firmly established' and therefore was not an independent and adequate procedural rule sufficient to bar review of the merits of a habeas petitioner in federal court.

Kindler IV at 79.[30]

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[30] Petitioners contend that other courts of appeals have held that a discretionary state procedural rule is *per se* inadequate, Pet. Br. 13 n.9, but that contention fails to withstand scrutiny. Three of the cited cases simply hold that a rule must be firmly established and consistently applied to be an adequate bar. *Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995) (bar that previously was not regularly applied adequate because now being regularly applied); *Deitz v. Money*, 391 F.3d 804, 811 (6th Cir. 2004) (rule not adequate where not consistently applied to

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C. The Adequate State Ground Doctrine and "Discretionary" Rules

Contrary to the Commonwealth's view, the adequacy of a state-court bar does not turn on whether it is labelled "discretionary" or "mandatory." This Court considers the "practical operation" of the rule in question, rather than just the "descriptive words which may be applied to it." *Lawrence v. State Tax Comm'n*, 286 U.S. 276, 280 (1932).

In particular, there are at least two questions concerning the "practical operation" of any "discretionary" rule that should be addressed in determining whether the rule is adequate: (1) are there any criteria that guide the exercise of the court's discretion? and (2) how has the rule been applied, *i.e.*, has there been a consistent practice of exercising discretion to allow review of the merits, or not?

A purely discretionary rule – one that provides no criteria for the court's exercise of its discretion – is

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similarly situated litigants); *Sechrest v. Ignacio*, 549 F.3d 789, 803 (9th Cir. 2008) (rule not consistently applied where state practice was to address merits in capital cases). The other case cited by Petitioners, *McKenna v. McDaniel*, 65 F.3d 1483, 1488-89 (9th Cir. 1995), is even further from the mark. In *McKenna*, the state supreme court described the claim at issue as possibly procedurally defaulted but then addressed it on the merits. Because the procedural ruling was "necessarily entwined" with the merits ruling, the Ninth Circuit held that the state court had not clearly indicated reliance on the procedural ground. *Id.* at 1489.

more likely than other rules to be inadequate. This is so because rules allowing for unfettered discretion make it easier to discriminate against disfavored claims or claimants, thus evading federal review. *See Williams v. Georgia*, 349 U.S. 375, 383 (1955) (state court may not "avoid[ ] the federal right" by using its discretion to "decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner"); *cf. Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (unfettered exercise of peremptory challenges is a practice "that permits 'those to discriminate who are of a mind to discriminate'") (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

Nevertheless, even a purely discretionary rule is not necessarily inadequate. If the state court's consistent practice is to enforce a "discretionary" rule, with only occasional acts of grace, then there is little reason to fear discrimination against particular claims or claimants, or an attempt to avoid a decision on the federal right asserted. *Compare Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 399 (1990) (state court's discretionary practice was adequate, in absence of showing that state courts "apply this exception in an irregular, arbitrary or inconsistent manner"); and *Adams*, 489 U.S. at 410 (state court rule adequate where it was "faithfully applied" in the "vast majority of cases"), *with Flowers*, 377 U.S. at 297 (state courts "have not heretofore applied their rules respecting the preparation of briefs with the pointless severity shown here"); and *Williams*, 349 U.S. at 383-84 (in

"practice," state courts granted review in similar circumstances).

In contrast, "discretionary" rules that articulate criteria to guide the court tend to assure that the court's decisions will be made and can be reviewed in a principled manner. Such rules are much more likely to be adequate, as they tend both to guide and channel the court's exercise of its discretion, and to enable reviewing courts to determine (without guesswork) whether the stated reasons actually apply in a given case.

Here, the trial court apparently applied a rule of unfettered discretion. The Pennsylvania Supreme Court proceeded to affirm the denial of direct review and then the denial of post-conviction review, based on either new criteria that it announced for the first time, a new rule of mandatory forfeiture, or both. Since neither of those rules was in existence at the time Kindler fled, neither was "firmly established or consistently applied." *James*, 466 U.S. at 348. The Third Circuit correctly found that the state court bar was not adequate to foreclose federal habeas review of the merits of Kindler's claims.

III. THE THIRD CIRCUIT'S RULING IS SUPPORTED ON THE ALTERNATIVE BASIS THAT THERE WAS NO ADEQUATE STATE GROUND BECAUSE OF THE PENNSYLVANIA RELAXED WAIVER PRACTICE IN CAPITAL CASES.

In the District Court, Third Circuit and in his Brief in Opposition to certiorari review, Kindler argued a separate reason why the bar ruling of the Pennsylvania courts in his case is not adequate. Because the Third Circuit held that the fugitive-forfeiture rule applied against Kindler was not adequate under *Doctor*, it did not reach this argument.

Under its practice in capital cases, the Pennsylvania Supreme Court reviewed the merits of virtually all issues raised in capital direct appeals and post-conviction proceedings, often applying "relaxed waiver" to multiple issues within the same case. *See* Attachment to Brief for Respondent (including 51 such cases). The Pennsylvania Supreme Court's deviation from its relaxed waiver practice renders its refusals to consider Kindler's claims an inadequate state ground, providing an alternative basis to support the Third Circuit's decision. Thus, there is no adequate state ground here even aside from the inadequacy relating to fugitive-forfeiture.

The Pennsylvania Supreme Court first articulated its practice of relaxed waiver in capital cases in 1978. *McKenna*, *supra*. This relaxed waiver practice "firmly established that a claim of

constitutional error in a [Pennsylvania] capital case *would not be waived* by a failure to preserve it." *Bronshtein*, 404 F.3d at 708 (quoting *Szuchon*, 273 F.3d at 326).[31] This practice remained in effect for twenty (20) years, including through filing of the briefs and submission of the case to the Pennsylvania Supreme Court in Kindler's post-conviction appeal. Because the relaxed waiver practice was "made broadly available" to capital defendants by the Pennsylvania Supreme Court, both "on direct appeal, [and] in the post-conviction context," *Ford*, 809 A.2d at 337 (Saylor, J., concurring), the potential application of a fugitive-forfeiture rule to a capital defendant was not "firmly established," and the state court's refusal to consider the merits in Kindler's case was not the application of an adequate bar.

This is particularly true with respect to the state court's reliance on a new rule treating a capital

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[31] Every Third Circuit judge who has addressed the Pennsylvania Supreme Court's relaxed waiver approach in capital cases has held that, as a result, there is no adequate state bar in Pennsylvania capital cases from the *Kindler* era. *See Bond v. Beard*, 539 F.3d 256, 277 (3d Cir. 2008); *Abu-Jamal v. Horn*, 520 F.3d 272, 287 n.15 (3d Cir. 2008); *Holland v. Horn*, 519 F.3d 107, 115 (3d Cir. 2008); *Laird v. Horn*, 414 F.3d 419, 425 (3d Cir. 2005); *Taylor v. Horn*, 504 F.3d 416, 428 (3d Cir. 2007); *Bronshtein v. Horn*, 404 F.3d 700, 708-10 (3d Cir. 2005); *Jacobs v. Horn*, 395 F.3d 92, 117 (3d Cir. 2005); *Crews v. Horn*, 360 F.3d 146, 153 (3d Cir. 2004); *Carpenter v. Vaughn*, 296 F.3d 138, 147 (3d Cir. 2002); *Szuchon v. Lehman*, 273 F.3d 299, 326 (3d Cir. 2001); *Jermyn v. Horn*, 266 F.3d 257, 278-79 (3d Cir. 2001); *Fahy v. Horn*, 240 F.3d 239, 245 (3d Cir. 2001).

defendant's escape during post-verdict proceedings as a waiver of the claims raised in those proceedings. *See Kindler I* at 3-4. Until *Freeman* was decided in 2003, the Pennsylvania Supreme Court routinely reviewed the merits of claims on direct appeal in capital cases, even though the appellants technically waived those claims by failing to raise them in post-verdict motions.[32] In *Kindler I,* on direct appeal, the Pennsylvania Supreme Court stated that claims were waived because the trial court properly dismissed the post-verdict motions. Under the relaxed waiver practice, however, Kindler's claims should have been heard on appeal *even though they were not properly preserved on post-verdict motions*. Not until the decision in *Kindler I* had the court ever hinted that this application of the relaxed waiver practice –

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[32] *See, e.g., Freeman*, 827 A.2d at 401 (prospectively abrogating use of relaxed waiver rule on direct appeal; observing that the "relaxed waiver practice has . . . been routinely employed . . . to reach claims that . . . were not raised at all in the trial court"); *Commonwealth v. Pirela*, 507 A.2d 23, 27 n.2 (Pa. 1986) ("This is apparently the first stage of the proceedings at which appellant raises this argument. Because of the relaxed rule of waiver which we apply to cases involving imposition of the death penalty, we will review the claim") (citation omitted)); *Commonwealth v. Stoyko*, 475 A.2d 714, 720-21 (Pa. 1984) (same for penalty phase issues not preserved at trial or raised on appeal); *Commonwealth v. Zettlemoyer*, 454 A.2d 937, 955 n.19 (Pa. 1982) ("This issue was not raised in post-verdict motions and is, accordingly, waived. However, [in capital cases] we will not adhere strictly to our normal rules of waiver. . . . Accordingly, significant issues perceived *sua sponte* by this Court, or raised by the parties, will be addressed and, if possible from the record, resolved").

consistently followed since *Zettlemoyer* – was not available to defendants who had post-verdict motions dismissed because they were fugitives.

Moreover, the court had previously followed the relaxed waiver practice in cases of capital defendants who otherwise could have been subject to fugitive-forfeiture. For example, Reginald Lewis and Kindler escaped *at the same time*, but the Pennsylvania Supreme Court did not apply the same rule to them. Lewis escaped while his appeal was pending, making his appeal subject to being quashed under Pa. R.A.P. 1972(a)(6), and under decisions going back to *Galloway*. Nevertheless, the Pennsylvania Supreme Court reviewed the merits on appeal, *Lewis I*, 567 A.2d at 1378 n.1, and again in post-conviction proceedings. *Lewis II*.[33]

Similarly, the Pennsylvania Supreme Court reviewed Nicholas Yarris' direct appeal and post-conviction claims on the merits, although he also escaped while his appeal was pending. *See Yarris III*,

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[33] This disparate treatment could render the bar here inadequate even apart from the other considerations discussed herein. *Cf. Romano v. Gibson*, 239 F.3d 1156, 1169-70 (10th Cir. 2001) (no adequate state ground where state court barred petitioner's claims but addressed merits of claims raised by petitioner's co-defendant in separate appeal, where both petitioner and co-defendant violated the same procedural rule); *Roper v. Weaver*, 550 U.S. 598, 601-02 (2007) (certiorari dismissed as improvidently granted; Court exercises discretion to "prevent . . . virtually identically situated litigants from being treated in a needlessly disparate manner").

731 A.2d at 584 (describing procedural history). Again, Yarris' appeal was subject to being dismissed under Pa. R.A.P. 1972(a)(6) and *Galloway*, but his claims were considered on the merits.

The logical explanation for *Lewis* and *Yarris* is that the Pennsylvania Supreme Court followed its relaxed waiver practice in those cases, overlooking any waiver consequences of the flights of those defendants. The Commonwealth proffers a different explanation – that the Pennsylvania Supreme Court treated Lewis and Yarris differently from Kindler, pursuant to the "flexible, discretionary standard for fugitive forfeiture," because they were recaptured more quickly than Kindler. Pet. Br. 39. This argument, however, ignores Pennsylvania's actual fugitive-forfeiture practice. Simply put, from *Passaro* on, Pennsylvania did *not* have a "flexible, discretionary standard" in cases where flight occurred during the pendency of appellate proceedings. The results in *Lewis* and *Yarris* make sense only in light of the Pennsylvania Supreme Court's practice of merits review in capital cases.

For similar reasons, *Commonwealth v. Judge*, 609 A.2d 785 (Pa. 1992), does not help the Commonwealth's argument. Judge fled post-sentencing, and actually filed his appeal while he was a fugitive. *Id.* at 786. The Pennsylvania Supreme Court expressly applied the fugitive-forfeiture holding of *Passaro*, *id.*, which it did *not* apply in *Kindler I*. *See Kindler I*, 639 A.2d at 3 (*Passaro* rule applies to "defendants who are fugitives from justice during the appellate

process"; "Here, however, Appellant's fugitive status did not take place during the pendency of an appeal before us."). Given that *Judge* and *Kindler* are so different procedurally, *Judge* does not show that Pennsylvania's failure to follow its practice of merits review in *Kindler* was firmly established and consistently applied.[34]

Pennsylvania's failure to follow its practice of relaxed waiver in capital cases provides an alternative

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[34] The Commonwealth may also argue that relaxed waiver was a "discretionary" practice, echoing recent statements by Chief Justice Castille. *See Freeman*, 827 A.2d at 400 n.9. However, *Freeman* also acknowledged that relaxed waiver was a "routinely employed" "practice." Indeed, while Chief Justice Castille asserted that there were "many instances" in which the court had "declined to invoke" relaxed waiver, he cited only six. Two of those (*Peterkin* and *Szuchon*) involved *Witherspoon* claims, which traditionally were treated as exceptions to relaxed waiver, while *Abu-Jamal* does not support the "discretionary" description. *Abu-Jamal* was reviewed on its merits, as the *Freeman* court itself acknowledged: in *Abu-Jamal*, the "relaxed waiver doctrine . . . *obliged* this court to review a *Batson* claim raised for the first time on direct appeal." *Freeman*, 827 A.2d at 395. Two other examples also involved exceptions to the standard practice: where a defendant made, but then withdrew, a motion to suppress, *Commonwealth v. Gribble*, 703 A.2d 426, 434-35 (Pa. 1997), and where counsel affirmatively decided not to request a cautionary instruction. *Commonwealth v. Wallace*, 561 A.2d 719, 725 (Pa. 1989). The last case cited was one where the court understood the substantive law to hold that there was no error without an objection. *Commonwealth v. Spotz*, 759 A.2d 1280, 1291 n.14 (Pa. 2000). The relaxed waiver practice is discussed in Statement of the Case, § B.1, *supra*, and the cases applying relaxed waiver are collected in the Attachment to this Brief.

ground that supports the rulings of the Third Circuit and the District Court. Should this Court find error in the Third Circuit's fugitive-forfeiture ruling, it should remand the case for further proceedings, including consideration of whether the Pennsylvania Supreme Court's rulings were adequate to preclude federal review in light of Pennsylvania's practice of relaxed waiver in capital cases.

CONCLUSION

For the reasons set forth above, Respondent prays that the Court affirm the judgment of the United States Court of Appeals for the Third Circuit. Alternatively, the Court should remand for further consideration.

Respectfully submitted,

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ATTACHMENT TO BRIEF OF RESPONDENT

Under the relaxed waiver practice, the Pennsylvania Supreme Court consistently reviewed claims that would otherwise have been deemed waived for a variety of reasons. The court applied relaxed waiver and reviewed the merits of claims in the following circumstances:

1. Failure of trial counsel to make a contemporaneous objection:

> *Commonwealth v. Gibson*, 720 A.2d 473, 481 n.2 (Pa. 1998); *Commonwealth v. Williams*, 720 A.2d 679, 684 n.12 (Pa. 1998); *Commonwealth v. Wayne*, 720 A.2d 456, 469 n.13 (Pa. 1998); *Commonwealth v. Spotz*, 716 A.2d 580, 591 (Pa. 1998); *Commonwealth v. Brown*, 711 A.2d 444, 455-56 (Pa. 1998); *Commonwealth v. Clark*, 710 A.2d 31, 40 (Pa. 1998) (trial counsel failed to request reconsideration of ruling denying request for appointment of second attorney and failed to renew request for second attorney); *Commonwealth v. Harris*, 703 A.2d 441, 445 n.5, 446 n.7, 9 (Pa. 1997); *Commonwealth v. Gribble*, 703 A.2d 426, 436-37 (Pa. 1997); *Commonwealth v. Elliott*, 700 A.2d 1243, 1252 n.21 (Pa. 1997); *Commonwealth v. Washington*, 692 A.2d 1024, 1030 n.11 (Pa. 1997); *Commonwealth v. Marinelli*, 690 A.2d 203, 214 n.19 (Pa. 1997); *Commonwealth v. Gibson*, 688 A.2d 1152, 1161-63 n.15, 19, 23 (Pa. 1997); *Commonwealth v. Miles*, 681 A.2d 1295, 1301 n.8 (Pa. 1996); *Commonwealth v. Hill*, 666 A.2d 642, 648 (Pa. 1995); *Commonwealth v. LaCava*, 666 A.2d 221, 228 n.8 (Pa. 1995); *Commonwealth v. Paolello*, 665 A.2d 439, 453

n.11 (Pa. 1995); *Commonwealth v. Miller*, 664 A.2d 1310, 1320 n.17 (Pa. 1995); *Commonwealth v. May*, 656 A.2d 1335, 1343 n.7, 1344 n.9 (Pa. 1995); *Commonwealth v. Williams*, 640 A.2d 1251, 1261 (Pa. 1994); *Commonwealth v. Billa*, 555 A.2d 835, 842 (Pa. 1989); *Commonwealth v. Yarris*, 549 A.2d 513, 521 (Pa. 1988); *Commonwealth v. Nelson*, 523 A.2d 728, 736 (Pa. 1987); *Commonwealth v. Baker*, 511 A.2d 777, 790 n.10 (Pa. 1986); *Commonwealth v. Pirela*, 507 A.2d 23, 27 n.2 (Pa. 1986); *Commonwealth v. Frey*, 475 A.2d 700, 707 n.4 (Pa. 1984).

2. Failure to raise the claim in post-verdict motions:

Commonwealth v. Speight, 677 A.2d 317, 326 n.15 (Pa. 1996); *Commonwealth v. Cook*, 676 A.2d 639, 649 n.26 (Pa. 1996) (court considered ineffectiveness of trial counsel claim on direct appeal even though new post-verdict counsel failed to raise the claim); *Commonwealth v. Johnson*, 668 A.2d 97, 102 n.12, 103 nn.14-15, 104 n.18, 106 n.20 (Pa. 1995); *Commonwealth v. Wharton*, 665 A.2d 458, 462 n.6 (Pa. 1995) (court considered claim that was raised in post-verdict motions, but was not argued to, or decided by, the sentencing court); *Commonwealth v. Miller*, 664 A.2d 1310, 1322, 1323 n.22 (Pa. 1995); *Commonwealth v. Walker*, 656 A.2d 90, 98-99 (Pa. 1995); *Commonwealth v. Crispell*, 608 A.2d 18, 22 n.1 (Pa. 1992); *Commonwealth v. Chester*, 587 A.2d 1367, 1382 n.9 (Pa. 1991); *Commonwealth v. Stoyko*, 475 A.2d 714, 720-721 (Pa. 1984).

3. Failure of appellate counsel to properly raise or brief the issue:

> *Commonwealth v. Spotz*, 716 A.2d 580, 585 n.5 (Pa. 1997); *Commonwealth v. Hall*, 701 A.2d 190, 200, 202 n.14, 207 n.17 (Pa. 1997) (court considered claim of prosecutorial misconduct even where appellant failed to explain why the prosecutor's comments were improper; court also considered an ineffectiveness claim where counsel did not properly frame the issue as a Sixth Amendment claim); *Commonwealth v. Gibson*, 688 A.2d 1152, 1160 n.13 (Pa. 1997); *Commonwealth v. Johnson*, 668 A.2d 97, 106 n.20 (Pa. 1995); *Commonwealth v. Simmons*, 662 A.2d 621, 636 (Pa. 1995) (court considered claim even though appellant improperly supported his argument by simply referring the court to the transcript of a pre-trial motions hearing); *Commonwealth v. Holcomb*, 498 A.2d 833, 837 n.6 (Pa. 1985) (practice in capital cases to address "significant issues perceived sua sponte by this Court"); *Commonwealth v. Stoyko*, 475 A.2d 714, 720-723 (Pa. 1984) (court considered claims of ineffectiveness that had not been raised until oral argument on direct appeal).

4. Petitioner's failure to raise post-conviction claim at trial and/or direct appeal:

> *Commonwealth v. Christy*, 656 A.2d 877, 881 n.2 (Pa. 1995) (state court considered *Ake v. Oklahoma* claim even though it was not clear that *Ake* applied retroactively and even though the *Ake* claim was not considered on direct appeal); *id.* at 885 n.14, 886 n.15 (court considered a PCRA claim of

prosecutorial misconduct even though the claim was not raised on direct appeal); *Commonwealth v. Banks*, 656 A.2d 467, 470 n.7 (Pa. 1995) (same); *Commonwealth v. DeHart*, 650 A.2d 38, 48 (Pa. 1994) (court granted relief on post-conviction claim despite the fact that "it was not previously raised below"); *Commonwealth v. Lesko*, 501 A.2d 200, 207 (Pa. 1985).

5. Claims raised for the first time in successive PCRA petitions:

Commonwealth v. Morales, 701 A.2d 516, 520 n.13, 528-29 (Pa. 1997) (granting relief on claim of prosecutorial misconduct not raised at trial, on direct appeal, or in first post-conviction claim; even if waiver not overcome by ineffective assistance claim, "this Court's practice has been to address all waived issues which have been raised in PCRA death penalty petitions"); *Commonwealth v. Szuchon*, 693 A.2d 959, 962-64 (Pa. 1997); *Commonwealth v. Travaglia*, 661 A.2d 352, 356 n.6 (Pa. 1995) ("it is this Court's practice to address all issues arising in a death penalty case, irrespective of a finding of waiver"; addressing merits of issues raised in second PCRA petition).

Following *Albrecht*, the Pennsylvania Supreme Court applied relaxed waiver in the following direct appeal cases:

Commonwealth v. Rizzuto, 777 A.2d 1069, 1081 (Pa. 2001) ("[A]s we apply a relaxed waiver rule in the direct appeal of cases involving the death penalty, we will address the merits of the issue as

presented in its current form"); *Commonwealth v. Natividad*, 773 A.2d 167, 178 (Pa. 2001) (same); *Commonwealth v. Bridges*, 757 A.2d 859, 874 n.16 (Pa. 2000) (same); *Commonwealth v. Kemp*, 753 A.2d 1278, 1285 (Pa. 2000) (same); *Commonwealth v. Fletcher*, 750 A.2d 261, 270 (Pa. 2000) (same); *Commonwealth v. Carson*, 741 A.2d 686, 697 (Pa. 1999) (same); *Commonwealth v. Mason*, 741 A.2d 708, 718 n.9 (Pa. 1999) (same); *Commonwealth v. Clark*, 710 A.2d 31, 40 (Pa. 1998) (same).

Following *Albrecht*, the Pennsylvania Supreme Court applied *Albrecht* retroactively in PCRA cases, while acknowledging that its prior practice had been to review all issues in capital cases:

Commonwealth v. Ligons, 971 A.2d 1125, 1137 (Pa. 2009) ("[W]e no longer apply the relaxed waiver doctrine in capital PCRA appeals") (citing *Albrecht*, 720 A.2d at 700); *Commonwealth v. Steele*, 961 A.2d 786, 796 (Pa. 2008) (same); *Commonwealth v. Tedford*, 960 A.2d 1, 15 (Pa. 2008) (same); *Commonwealth v. Rainey*, 928 A.2d 215, 224 (Pa. 2007) (same); *Commonwealth v. Jones*, 912 A.2d 268, 278 (Pa. 2006) (same); *Commonwealth v. Fletcher*, 896 A.2d 508, 520 (Pa. 2006) (same); *Commonwealth v. Zook*, 887 A.2d 1218, 1227 (Pa. 2005) (same); *Commonwealth v. Washington*, 880 A.2d 536, 539 (Pa. 2005) (same); *Commonwealth v. Hall*, 872 A.2d 1177, 1182 (Pa. 2005) (same); *Commonwealth v. Jones*, 876 A.2d 380, 384 (Pa. 2005) (holding claims procedurally barred under the PCRA because, after *Albrecht*, "the relaxed waiver doctrine is no longer applicable to PCRA

appeals"); *Commonwealth v. Brown*, 872 A.2d 1139, 1156 (Pa. 2005) (*Albrecht* was "the seminal case . . . where this Court eliminated the capital case relaxed waiver rule on PCRA review"); *id.* at 1161-62 (Castille, J., concurring) (*Albrecht* "abrogated relaxed waiver on PCRA review . . . thereby rendering the previously nonwaivable claims defaulted"); *Commonwealth v. Reyes*, 870 A.2d 888, 893-94 (Pa. 2005) (same); *Commonwealth v. Hughes*, 865 A.2d 761, 816 (Pa. 2005) (Castille, J., concurring and dissenting) (*Albrecht* was "the seminal decision . . . which eliminated the relaxed waiver rule on capital PCRA review precisely because that judicial rule wrongly subverted the PCRA's statutory waiver"); *Commonwealth v. Cox*, 863 A.2d 536, 555 n.1 (Pa. 2004) (same); *Commonwealth v. Crews*, 863 A.2d 498, 504 (Pa. 2004) ("[B]etween the filing of his first and second [PCRA] petitions, relaxed waiver was abolished in capital PCRA cases. [*Albrecht*] Thus, when first PCRA counsel failed to raise certain issues, appellant was not on notice that counsel's failure would lead to an eventual time-bar of those claims."); *Commonwealth v. Gribble*, 863 A.2d 455, 468 (Pa. 2004) (same); *Commonwealth v. Wilson*, 861 A.2d 919, 928 n.8 (Pa. 2004) (same); *Commonwealth v. Harris*, 852 A.2d 1168, 1171 n.9 (Pa. 2004) (same); *Commonwealth v. Rush*, 838 A.2d 651, 655-56 (Pa. 2003) (same); *Commonwealth v. Freeman*, 827 A.2d 385, 398, 401 (Pa. 2003) (after *McKenna*, relaxed waiver rule became "such a matter of routine that it [was] invoked to capture a myriad of claims, no matter how comparatively minor or routine"); *Commonwealth v. Clayton*, 816 A.2d

217, 221 (Pa. 2002) (same); *Commonwealth v. Johnson*, 815 A.2d 563, 593 (Pa. 2002) (Eakin, J., concurring and dissenting) (before *Albrecht*'s "abolition of relaxed waiver in PCRA capital appeals" procedurally barred claims were reviewed on merits); *Commonwealth v. Grant*, 813 A.3d 726, 733 n.10 (Pa. 2002) (same); *Commonwealth v. Wharton*, 811 A.2d 978, 991 n.1 (Pa. 2002) (Saylor, J., concurring) (noting *Albrecht*'s "retroactive abolition of relaxed waiver"; explaining that relaxed waiver "doctrine had been generally extended in [the PCRA] area and permitted review of the underlying allegations on their merits" even when procedurally barred; and finding it unfair to apply "the more stringent standards subsequently adopted by the Court" in *Albrecht*); *Commonwealth v. Marshall*, 810 A.2d 1211, 1231 (Pa. 2002) (Castille, J., concurring and dissenting) (relaxed waiver rule was "judicial negation of the PCRA's waiver provisions"); *id.* at 1232 (criticizing lead opinion's "relaxed waiver approach" of addressing barred claims on merits as "consistent with the approach taken in . . . the cases pre-dating *Albrecht*"); *Commonwealth v. Ford*, 809 A.2d 325, 337-38 (Pa. 2002) (Saylor, J., concurring) (before *Albrecht*, relaxed waiver "permitted review of the underlying allegation on its merits" despite procedural bar; since then, a "far more stringent set of rules" has been "implemented by the Court"); *id.* at 348 (Eakin, J., dissenting) ("The doctrine of 'relaxed waiver' was eliminated by *Albrecht*"); *Commonwealth v. Pirela*, 726 A.2d 1026, 1030 n.5 (Pa. 1999) (noting that the court "recently held" in *Albrecht* that the "practice" of relaxed waiver "will be

discontinued"); *Commonwealth v. Laird*, 726 A.2d 346, 354 (Pa. 1999) ("the relaxed waiver rule" that formerly applied in capital cases "will no longer be applied to PCRA appeals in death penalty cases"); *Commonwealth v. Wallace*, 724 A.2d 916, 920-21 (Pa. 1999) ("under *Albrecht*, the relaxed waiver rule is no longer applicable in PCRA appeals"); *Commonwealth v. Pursell*, 724 A.2d 293, 303 (Pa. 1999) (after *Albrecht*, "we now require strict adherence to the statutory language of the PCRA").

REPLY BRIEF

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(7)

No. 08-992

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In The
Supreme Court of the United States

JEFFREY A. BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL.,
Petitioners,

v.

JOSEPH J. KINDLER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Argument

I. Kindler cannot recast the question presented by misrepresenting events below.

Kindler does not wish to address the question on which this Court granted review. He says he should not have to, because the Commonwealth secured review on a false pretense: that the case involves a discretionary state procedural rule. In fact, charges Kindler, the Commonwealth's position in the Third Circuit was that Pennsylvania's fugitive forfeiture rule was strictly mandatory; only now does the Commonwealth state that the rule was discretionary.

But Kindler's accusation is invented. In federal court the Commonwealth consistently described, and defended, the state's flight rule as discretionary. That is indeed the rule the state courts consistently applied. And it was for that reason – the element of discretion – that the federal habeas court declared the rule inadequate.

A. The Commonwealth's position below.

Kindler begins his brief, in the first sentence of the first printed page, with his claim that petitioners have recently flip-flopped about the nature of Pennsylvania's escape rule. Brief for Resp. at i. The allegation is repeated in both the statement of the case and the argument section of the brief. *See, e.g.*, Brief for Resp. at 25, 48, 49. For a point given such prominence, one might expect quotation from, or at least citation to, the portions of the briefs below where the Commonwealth's argument contradicted its current stance.

But there is none – at all; because none is possible. In reality, from the beginning of the federal habeas litigation, in both the district court and the court of appeals, the Commonwealth's filings acknowledged that "the state's doctrines regarding fugitive status contained some flexibility and permitted some judicial discretion,"[1] and stated plainly that where "a state procedural rule is structured to permit flexibility, it becomes clear that specific instances of flexible application cannot render the rule an 'inadequate' ground."[2] That is hardly a "mandatory-bar argument," as Kindler falsely labels it.

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[1] Initial Brief of Appellants, filed in the court of appeals August 4, 2006, at 56; *see generally* 56-58.

[2] Third-Step Brief of Appellants, filed in the court of appeals June 27, 2007, at 63; *see generally* 44-45, 56-58, 61-66.

See also Response to Amended Petition for Habeas Corpus, filed in the district court September 16, 2002, at 63-64, 77-78; Surreply to Kindler's Reply Memorandum, filed in the district court April 30, 2003, at 33-34, 38-39.

The Commonwealth's briefs are contained in the official record certified to this Court. They are not reprinted in the Joint Appendix, because Kindler raised this allegation for the first time only after the appendix was prepared. Of course, were the charge true, it should have, and no doubt would have, appeared in Kindler's brief in opposition to the petition for writ of certiorari. *See Schiro v. Farley*, 510 U.S. 222, 229 (1994) (Court relies heavily on submissions of the parties at the petition stage; declining to reach argument omitted from brief in opposition, "although we undoubtedly have the discretion" to consider it). The Commonwealth has lodged additional copies of its briefs with the Clerk's Office.

B. The state court rulings below.

Along the same lines, Kindler also attempts to portray the state court rulings as knee-jerk, non-discretionary refusals to allow review of his case. To support this characterization, Kindler declares that the Pennsylvania courts had an established "practice" of reinstating the claims of recaptured fugitives, except him.

There was no such practice. There was simply a rule – stated in at least five different cases in the years leading up to Kindler's escape-and-emigration scheme – that the courts had discretion in regard to former fugitives.[3] In three of these former-fugitive cases, the Pennsylvania courts permitted appeals to proceed;[4] in

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[3] *Commonwealth v. Boyd*, 366 A.2d 934, 935 (Pa. Super. 1976) ("If he thereafter returns, it is a matter of discretion of the court whether or not the circumstances justify a reinstatement.... [T]he trial court did not abuse its discretion in refusing" review); *Commonwealth v. Borden*, 389 A.2d 633, 633-34 (Pa. Super. 1978) ("Appellant has since returned.... We conclude that it would not be an injudicious exercise of our discretion to permit appellant to refile"); *Commonwealth v. Harrison*, 432 A.2d 1083, 1085 (Pa. Super. 1981) (quoting *Borden*'s discretion language; "[w]e find the preceding rationale apposite to the case at bar"); *Commonwealth v. Clark*, 446 A.2d 633, 634 (Pa. Super. 1982) ("when appellant returns to the court's jurisdiction, ... it is within our discretion to remand for reinstatement.... We conclude instead that the trial court did not abuse its discretion in declining to reinstate"); *Commonwealth v. Milligan*, 452 A.2d 1072, 1073 (Pa. Super. 1982) ("we believe that justice would be served by exercising our discretion to permit Appellant to refile").

[4] *Borden*, *Harrison*, and *Milligan*.

two they did not.[5] Three to two is not a "practice." The practice was to exercise discretion.

Kindler tries to muddle matters with his discussions of fugitive forfeiture cases decided *after* his 1984 flight. He wishes to create the impression that these cases were confused and contradictory. As Kindler has acknowledged, however, and as the court below held, "the adequacy of the rule is determined by the law in effect at the time of the asserted waiver." Cert. App. 21.[6] Thus it would not matter whether there were vagaries in the flight rule at later points in time; all that matters is whether the law provided sufficient guidance in 1984, when Kindler created the default by choosing to become a fugitive.

The rule in place then, and the rule applied to Kindler, was one of discretion. The trial court exercised its discretion not to reinstate Kindler's legal claims, and that decision created a default that the succeeding courts simply enforced.[7] Kindler seeks to

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[5] *Boyd* and *Clark*.

[6] Kindler makes this point clearly and repeatedly as recently as his Brief in Opposition, at i, ii, 1, 3, 5, 9, 10, 13, 14, 26; tellingly, it is far less clear in his brief on the merits.

[7] *See* common pleas court opinion at JA 70 (the "order denying defendant's motion to reinstate post-verdict motions did not amount to an abuse of discretion"); opinion on direct appeal at Cert. App. 85 (because the trial judge's response was reasonable, "this appeal comes to us without any allegations of error (direct or collateral) preserved"); common pleas opinion on post-conviction review at JA 187 ("the Supreme Court has already ruled that the defendant's decision to become a fugitive resulted in the waiver of all issues"); opinion on post-conviction appeal at Cert. App. 77 ("To

avoid the import of these rulings by proclaiming each to be an independent "new procedural rule." He proceeds as if the forfeiture imposed by the trial court came with an expiration date, and at every succeeding level of review the next court had to determine from scratch whether forfeiture should be reimposed. In reality, however, there were no new forfeiture rulings, "novel" or otherwise. The state courts merely chose not to change their mind about the underlying default.[8]

Kindler's legal claims thus were forfeited, and stayed forfeited, as the consequence of the trial court's original exercise of discretion. Not surprisingly, the accident of Kindler's eventual apprehension and return, after two brazen breakouts and years of extradition litigation, just did not impress the state courts as a persuasive reason for reinstating the rights that Kindler elected to leave behind.

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grant Appellant the relief he requests in his [post-conviction petition], an evidentiary hearing on claims already *forfeited* by his flight from captivity, would render meaningless all previous rulings of the trial court and of this Court").

[8] *See, e.g., Commonwealth v. Huff*, 658 A.2d 1340 (Pa. 1995). Kindler repeatedly, and improperly, cites this case as establishing a rule that Pennsylvania defendants are entitled to collateral review despite prior flight. In fact the opinion contains no such statement. Rather, this is simply a case where the trial court exercised its discretion to *allow* further review following the defendant's flight, and the *Huff* court enforced that decision – just as the courts in Kindler's case enforced the trial court's discretionary decision to *deny* further review. The reason there was a default in Kindler's case was therefore the same as the reason there was no default in Huff's case: the exercise of discretion by the court from which the defendant fled.

C. The federal court ruling below.

Next Kindler tries to reinvent the Third Circuit's decision below. He insists that, despite its language, the opinion actually had nothing to do with whether discretionary state procedural rules can constitute an adequate state ground.

Kindler advocates this idea on the basis of the Third Circuit's earlier decision in *Doctor v. Walters*, 96 F.3d 675 (3rd Cir. 1996), on which the panel here said it was relying. Kindler contends that the *Doctor* decision – which also excused a Pennsylvania fugitive from the consequences of his forfeiture – did not turn on the escape rule's discretionary nature. *Ipso facto*, says Kindler, neither did the court of appeals decision in this case.

From the imprecise language of the *Doctor* opinion, however, it is far from clear that discretion had nothing to do with it. Plainly Mr. Doctor himself believed that discretion had everything to do with it, as evidenced by the very first lines of his appellate briefing on the adequacy issue.[9] The *Doctor* panel never had to clarify its position on the matter, though, because it had already disposed of the appeal on an unrelated ground, and its discussion of the fugitive forfeiture rule was dictum, addressed only "in the interests of judicial economy" in the event that the

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[9] "A state rule which is discretionary, rather than mandatory, is not 'adequate' to support a procedural default [citations omitted]. There can be no doubt but that the fugitive forfeiture rule in Pennsylvania is discretionary." Brief for Appellant, Gary Lee Doctor, No. 95-3484, 1996 WL 33577464, *28 (3rd Cir.).

adequacy issue should arise in future litigation. 96 F.3d at 683.

Not that it really matters. *Doctor* is not the case on review here. In discussing *this* case, Kindler carefully interweaves language from the *Doctor* opinion, but skims over the operative language from *this* opinion: that the state courts "*had discretion*" and "*[a]ccordingly*" the Pennsylvania fugitive forfeiture rule was inadequate. *See* Brief for Pet. at 12.[10]

As important as what the opinion below said, moreover, is what it did not say. Kindler posits that the panel merely considered whether the state forfeiture ruling in this case was discretionary or mandatory, to make sure it was consistent with existing state law. There is one problem with that reading: not a single sentence of the Third Circuit opinion here actually addresses whether the state ruling rendered in Kindler's case was discretionary or mandatory. Without any discussion of that point, let alone a determination on it, the court could not possibly have been conducting the kind of "as applied" consistency analysis that Kindler wishes to ascribe to it. Instead, the court's analysis consists of only two points: the state rule is discretionary; the state rule is accordingly inadequate.

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[10] Kindler wishes to disregard another Third Circuit precedent, *Lines v. Larkin*, 208 F.3d 153, 168-69 (3rd Cir. 2000), on the ground that it was not cited in the opinion below. The significance of *Lines*, however, is that it was written by the same judge who wrote the opinion here, using almost exactly the same language used here, to equate discretion and inadequacy. *See* Brief for Pet. at 12 n.8.

Kindler's reluctance to defend the actual holding below is understandable. The court of appeals dismissed, *per se*, a rule that has been well-established for decades in virtually every jurisdiction, and that was applicable here in the most compelling of circumstances. The law does not support that result.

II. Discretionary rules are adequate; reasonable notice and opportunity is the standard.

This was not your average procedural default.

When Joseph Kindler was arrested for operating a burglary ring, he planned and executed the torture murder of the key witness, in order to escape the trial process. When that did not work, he planned and executed a prison breakout, in order to escape the appellate process. When that did not work, he planned and executed another breakout, in order to escape the extradition process. When that did not work, he finally turned to the law – theirs, not ours. Had the Canadian Supreme Court gone one vote the other way, Kindler would be up there still, proud that his planning and persistence did, in the end, succeed.

If the adequate state grounds doctrine can excuse all that, something is seriously wrong with the way the doctrine has come to be applied. Kindler insists that everything is just fine as it is. But his apologetics are unsuccessful.

A. Reasonable notice v. "firmly established"

Kindler has many scary things to say about the Commonwealth's proposal for clarification of the adequacy doctrine: that it is a "radical request" for

"drastic change," for example, that will "replace an entire existing body of law," with "sweeping effects across the entire range of litigation." He protests that the Commonwealth is trying to reduce all of adequacy law to a single phrase. Brief for Resp. at 27, 33, 34, 39.

He protests too much. WRIGHT AND MILLER is perhaps the leading commentary on federal court jurisdiction; the Commonwealth has merely followed its lead. As the treatise makes clear, the notice and opportunity approach is not a new doctrine; it is a distillation of everything the Court has been saying about adequacy for a century. There is nothing wrong with stating a legal principle in a single phrase (subject, of course, to further refinement in future cases), rather than as a twelve-part standard with 27 sub-tests; as his argument makes clear, Kindler too is pushing a single phrase. He likes "firmly established."

So it is worth comparing the two approaches. Kindler claims that a notice and opportunity standard would require federal courts to enforce "paper" rules – rules that have been published or codified, but that are actually applied by the courts in some manner other than their apparent language might suggest. But of course not. A reasonable notice analysis does not preclude consideration of subsequent interpretations of a rule. But neither does it demand inflexibility in those interpretations. The "real" rule is the rule as it develops, both on paper and in practice, to allow for application to particular facts and circumstances.

Kindler's "firmly established" test, on the other hand, demands something very unreal. As he admits, he expects the federal courts to require "consistency *vel non*" from state procedural rulings. Brief for Resp.

at 36. Consistency or not – consistency in and of itself, for its own sake. So if the rule is not "strictly followed," it will be treated as if it does not exist. And if the answer to any particular procedural question is not certain or near certain, the litigant may proceed as if there were no rule at all.

Of course there are few rules like that, state or federal. In real life the answers are seldom certain. Rules are real even if the "right" answer is subject to rational debate and specific circumstances.[11] That is why *reasonable* notice of what is required, and a *reasonable* opportunity to do it, must suffice. Otherwise litigants will be excused from defaults for which they have no excuse.

This case is a conspicuous example. Kindler has been quibbling for decades about whether, at particular moments in time, the Pennsylvania fugitive forfeiture rule was "discretionary" or "mandatory." But for adequacy purposes, what difference does it make? Was Kindler, as he sat in his cell mapping out his escape route to Canada, also calculating his chances of reinstatement of appellate rights seven years later? Would he have just stayed put had he believed that forfeiture was certain rather than highly likely? Should he escape the consequences of his escapes because of that kind of "uncertainty?"

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[11] *See Pace v. DiGuglielmo*, 544 U.S. 408, 415 n.5 (2005) ("few truly mechanical rules exist"; rejecting argument, by the same counsel now representing Kindler, that state post-conviction filing deadlines which allow for the exercise of judicial flexibility should not be enforceable on federal habeas corpus review as "proper filing" requirements).

No mystery, then, that Kindler would urge his "firmly established" standard. It encourages federal courts to contemplate such overnice distinctions, even if they could have made little difference to the litigants. It asks federal courts to assay an ever-expanding universe of opinions and orders, to confirm that they are consistent *vel non*. And it invites federal courts to treat any development of the law as suspiciously "novel," no matter how reasonable it may be.

At this level of scrutiny, federal courts become the ultimate arbiter of state procedural matters – but with no skin in the game. They are free to apply their own rules of procedure as flexibly as they see fit, while the state courts are subject to an unrealistic oversight that the federal courts would never impose on themselves. Kindler says "it works." It certainly has so far for him. As the states' *amicus* brief make clear, though, that is far from true for everyone else.

B. Rare and fettered.

Kindler nonetheless insists that his proposed standard for dissecting the adequacy of state grounds leaves room for discretionary rules. They just have to be the right kind of discretionary rules. By this, Kindler means two things. First, any discretion to relax a procedural requirement must be exercised only infrequently, or else the requirement is not a real one. Second, on those occasions when discretion is exercised, there must not be too much room for it; pre-existing criteria must be in place to ensure that the court is not free to make up its own mind in the circumstances of the case. *See* Brief for Resp. at 54-56.

With these limitations, what Kindler would permit under the adequacy doctrine is no longer really discretion. If courts are to exercise judgment about excusing strict compliance, there can be no quota governing the rate at which they do so. Some courts, for example, may liberally suspend briefing deadlines but apply word limits more strictly; other courts may do just the opposite. But these are policy choices, not inconsistencies. Surely no one is counting up the number of "good cause" exceptions granted under various provisions of the federal rules of procedure. The states are entitled to at least the same courtesy.

Nor is there a legitimate basis for requiring substantive fetters on discretion. Federal rules generally function without them: the court simply decides according to amorphous benchmarks like "if justice so requires" or "as it considers appropriate." *See* Brief for Pet. at 18 n.12. The federal plain error rule, for example, is subject only to such vague guidance, and even then the courts are cautioned that the ultimate decision must be case-specific and fact-intensive. *See* Brief for Pet. at 22-23. The federal fugitive forfeiture rule lacks even that much in the way of court-imposed "criteria." *See* Brief for Pet. at 24-25.

When standards do develop over time through case law, moreover, that does not mean that prior exercises of discretion were illegitimate because they were "standardless." Yet that is in effect what Kindler contends. He says that the forfeiture ruling in his own case was an unfair, novel application of the rule, because the Pennsylvania courts had not previously suggested that returned fugitives might want to provide a compelling reason for reinstatement of their

claims. Brief for Resp. at 21-22, 44. Are we truly to believe, however, that Kindler had a compelling reason that would somehow excuse his double escape, but he did not think he could mention it absent specific "compelling reason" precedent? If so, what was his reason? It has been 25 years. Perhaps by now Kindler might have explained why any court with discretion to reinstate would conceivably have wanted to do so in the circumstances of his case.

It is clear what Kindler is really after: an adequacy standard that will "enable reviewing courts to determine (without guesswork) whether the stated reasons actually apply in a given case." Brief for Resp. at 56. Except that, in the end, the reviewing courts in question will not be state courts; they will be federal courts. Because the only way to determine whether state procedural rulings are *consistent* is to determine whether they are *correct* – "whether the stated reasons actually apply in a given case." That is not what the adequate state grounds doctrine is for.

C. Evasive and elected.

Kindler demurs. He contends that state courts might use procedural grounds to rule against capital and other criminal defendants. An intrusive, rigid adequacy standard is therefore exactly what is needed, because it might help combat such "evasion." The adequacy doctrine, however, does not regulate state procedural rulings in criminal cases; it protects disfavored claims, not "disfavored" classes of criminals. The question is whether the state courts use their procedural rules as a pretext for denying federal rights.

Kindler suggests no evidence that there is a current crisis in this regard, and his own case proves just the opposite. The Pennsylvania courts have granted sentencing relief to at least 16 capital defendants on the very same federal constitutional issues that supposedly support relief here. *See* Brief for Pet. at 28-29 n.21. Nor has there been "discrimination" even on the basis of fugitive status. Of the four Pennsylvania capital murderers who escaped, two defendants (one white, one black) were subject to the forfeiture rule, and two defendants (one white, one black) received full merits review. *See* Brief for Pet. at 39-40.[12]

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[12] Kindler suggests that the hostility of the state courts to federal claims is highlighted by the fact that he and his fellow escapee, Reginald Lewis, both received relief once they got to federal court. But that would not explain the many other capital defendants who were granted relief in state court. In any case, the district court's grant of relief in Lewis's case has now been reversed by the Third Circuit and the matter remanded for further proceedings. *Lewis v. Horn*, Nos. 06-9007, 06-9008, 2009 U.S. App. LEXIS 20451 (3rd Cir., filed Sept. 14, 2009).

As for Kindler, the "*Mills*" claim on which he received relief, *see Mills v. Maryland*, 486 U.S. 367 (1988), is now before this Court in another case, raising virtually the same issues. *Smith v. Spisak*, 129 S. Ct. 1319 (2009) (scheduled for argument October 13, 2009). The remaining sentencing claim addressed by the panel here – a mitigation ineffectiveness issue – was discussed only as dictum in order "to provide guidance in future cases." Cert. App. 35. Perhaps that is why the panel took the liberty of stating its views about new mitigation evidence that had been presented only by way of defense affidavits, and has never been the subject of an evidentiary hearing.

An additional Pennsylvania capital escapee, Roger Judge, has also received relief in federal district court, but on the basis of the

Nevertheless, says Kindler, there is a reason we must presume that state courts are using procedural rulings to evade federal claims: because in many states, judges are elected. Brief for Resp. at 38. This is a remarkable contention – even putting aside the fact that the Pennsylvania judges who have repeatedly granted relief to capital defendants were all elected.

In a democracy, it is impossible to hermetically seal off even appointed judges from the political process, particularly in light of the possibility of elevation to a higher office. But that has not been thought an appropriate basis for imposing more restrictive legal standards for either substantive or procedural rulings. Federal judges would be rightly insulted at any suggestion that they be stripped of discretion, on the presumption that it will be abused for political purposes. State judges – who are subject not to federal supervisory authority, but to federal constitutional requirements in a federalist system of government – would have even more cause for objection.[13]

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same adequacy arguments and the same *Mills* issue presented in this case.

[13] The issue has nothing to do with this Court's recent decision in *Caperton v. A.T. Massey Coal Co*, 129 S. Ct. 2252 (2009), on which Kindler attempts to rely. The question there was whether a $3,000,000 contribution from a specific political supporter made it unlawful for a judge to preside in a specific case in which that supporter sought to overturn a $50,000,000 judgment. The question here is whether this Court should adopt a general presumption of bias, and accordingly impose a blanket intrusion on state courts' authority over their own procedural rules, because some states choose to select judges through popular election.

In any case, Kindler's contentions about state courts are not only offensive; they are overbroad. If state judges are inherently biased against criminals raising federal claims, then *every* habeas doctrine – not just adequate state grounds, but exhaustion, deference, filing deadlines, *etc.* – should be altered to ensure merits review in federal court. Some might favor such a policy; but Congress, which writes the habeas act, has gone exactly the other way.[14]

Even if the goal, moreover, were to re-engineer habeas law in order to make it more friendly for state criminals, the adequacy doctrine would be the worst place to start. Kindler's proposed standard for adequacy review would not eliminate state procedural defaults; it would only eliminate state procedural defaults based on the exercise of discretion.

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[14] Kindler tries to turn this reality on its head with his preemption-by-silence argument. He contends that Congress did nothing to change the adequate state grounds doctrine when it enacted AEDPA in 1996, and therefore this Court is bound to preserve the doctrine in perpetuity, exactly as it was understood on the statute's effective date.

In the habeas context, however, the adequate state grounds doctrine is merely an element of the procedural default rule. That rule has never been the subject of Congressional action, either in AEDPA or previously. The rule is a creature of this Court's case law. The Court has agreed to consider modifications to the procedural default standard, even after AEDPA. *See, e.g., Dretke v. Haley*, 541 U.S. 386, 394 (2004) (whether to adopt actual innocence exception for non-capital sentencing claims; "the various exceptions to the procedural default doctrine are judge-made rules"). Clearly, the Court is free to reexamine its adequate state grounds precedent as it may do with any precedent.

Mandatory rulings would remain. The result would be *more* defaults, not fewer.

Apparently recognizing this dilemma, Kindler resorts to mere chutzpah: he blames the Commonwealth, asserting that his forfeiture should be forgiven in federal court because the state is just trying to execute him without any review at all. But it was not the Commonwealth's idea to short-circuit the challenge to Kindler's sentence; he arranged all that by himself. He essentially said to the state courts, "so long, suckers," and now demands to know where his appeals went. They went across the border with him. That was the "appeal" he chose.

Yet Kindler really goes even farther with this argument. What he is necessarily saying is that there cannot be *any* fugitive forfeiture rule for capital murderers, discretionary or not, because then the state will be able to execute them without review. He implies, with his discussions of *Ortega-Rodriguez v. United States*, 507 U.S. 234 (1993), that the Constitution condemns such a rule. Indeed his rationale would prohibit *all* procedural default rules in capital cases, because any of them might prevent relief on that one claim that would have saved the defendant from his sentence.

Of course that is not the law. There is no constitutional bar on fugitive forfeiture rules even if they are mandatory, *see Goeke v. Branch*, 514 U.S. 115 (1995), and there is no constitutional bar on procedural defaults even when the sentence is capital, *see Coleman v. Thompson*, 501 U.S. 722 (1991).

Kindler's argument, however, does illustrate the anomaly arising from a "firmly established" standard for adequate state grounds. A defendant who mounts a frontal constitutional challenge to a state court procedural bar, as in *Goeke v. Branch*, must exhaust the claim in state court. And if he prevails, his relief will be to receive the state review that the state improperly denied him under the unconstitutional rule.

But if, instead, a criminal defendant chooses to say nothing in state court, and to wait to federal court to challenge the state rule on adequacy grounds, he need only identify some kind of "inconsistency" in the application of the rule. He can then proceed directly to *de novo* merits review by the federal habeas judge. As a consequence, the litigant receives greater advantage, with less trouble, by asserting that a state rule has been applied "inconsistently" than by establishing the rule's outright unconstitutionality.

This aberration raises a significant question about the role of adequate state grounds review in federal habeas litigation. Perhaps, as suggested by the Criminal Justice Legal Foundation, *amicus* brief at 29-30, adequacy analysis has become extraneous in the habeas context, and procedural defaults should be left to the by now well-developed, case-specific, cause-and-prejudice standard. At the very least, it is clear that the aggressive adequacy approach advocated by Kindler is inappropriate.

III. "Relaxed waiver" is a red herring.

When post-*Furman*[15] capital cases began reaching the Pennsylvania Supreme Court in the 1980's, the scope of warrant, stay, and post-conviction procedures was still uncertain. Accordingly, in the interests of justice, the court on many occasions agreed to consider claims that were not properly preserved. *See Beard v. Banks*, 542 U.S. 406, 413 (2005) (noting Pennsylvania Supreme Court's "past discretionary practice of declining to apply ordinary waiver principles in capital cases"). Eventually this practice became known as "relaxed waiver."

Kindler contends that, for adequate state grounds purposes, relaxed waiver acted as a sort of super-solvent on Pennsylvania procedural rules. Because the state supreme court frequently reached unpreserved claims, argues Kindler, Pennsylvania capital defendants were entitled to presume that no rules would ever be invoked against them. The court's exercise of discretion meant that ordinary waiver principles were not applied in a consistent fashion, and thus it rendered *all* rules inadequate. This would include, in Kindler's view, any kind of rule that conditioned post-trial review on not escaping from prison. Consequently, even if the Pennsylvania fugitive forfeiture rule was not, in itself, inadequate, it could still have been trumped in capital cases by relaxed waiver, and is therefore unenforceable on federal habeas corpus review.

There are some problems with Kindler's theory.

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[15] *Furman v. Georgia*, 408 U.S. 238 (1972).

A. Escape is not a procedural misstep.

The Pennsylvania Supreme Court made clear on appeal in this case that the relaxed waiver doctrine does not apply to a forfeiture resulting from the act of becoming a fugitive. Cert. App. 77-78. Kindler contends that this Court must disregard that statement of state law by the state's highest court. Treating his escape as a procedural peccadillo – equivalent to the failure to make a contemporaneous objection – he argues that, at the time of the breakouts, he had no reason to believe that the fugitive forfeiture rule would not be relaxed; how was he supposed to know? Therefore the application of the rule against him constituted an inadequate state ground.

But Kindler did not need the state supreme court to say so in order to realize that breaking out of prison is something very different than mere failure to leave a forwarding address. Escape is a crime in itself, a felony. The default it produces is a forfeiture by wrongdoing, not by oversight. Under Kindler's rationale, he should have been free not only to appeal, but to challenge the admission of out-of-court statements by the victim concerning their criminal enterprise, had he been able to make any before Kindler caught up with him. The fact that he murdered the victim precisely to keep him from testifying would not, in Kindler's view, stand in the way of such a confrontation clause claim: are not *all* forfeitures overcome by relaxed waiver?

Kindler says it was perfectly natural for him to assume that he could have his escape and eat it too. But even a child knows not to count on getting away

with that. There was no "inadequacy" in the state court's failure to relax fugitive forfeiture for Kindler.

B. Relaxed waiver was never a legal entitlement, and certainly was not in 1984.

Even aside from the unique status of a forfeiture by wrongdoing, Kindler could not reasonably have relied on relaxed waiver to pardon all his procedural violations. As this Court has recognized, relaxed waiver was simply "the possibility that a state court might, in its discretion, decline to enforce an available procedural bar." *Beard v. Banks*, 542 U.S. at 413. Kindler emphasizes the frequency with which the Pennsylvania Supreme Court exercised that discretion. But such forbearance did not give capital defendants an enforceable right to flout the rules, any more than a litigant is entitled to file a late brief on the ground that the court in question has generally granted extensions in the past.

Even Kindler seems to have gotten that point, as his own actions prove. He says that, because of relaxed waiver, he thought he did not have to comply with procedural requirements. But the truth is that, from the moment he was convicted in 1984, Kindler diligently complied with virtually every procedural requirement in Pennsylvania post-trial practice. He filed post-verdict motions, a written petition to reinstate those motions, a notice of appeal and appellate brief, a collateral review petition, and numerous other documents, all within the required time and format.

Under Kindler's version of relaxed waiver as a "rule" that voided all other rules, he did not have to do

any of that. He could have just waited until the state eventually scheduled an execution date, at which point he could have raised any issue he wished, and stretched it out for as long he wished, secure in the knowledge that the courts would entertain his claims under the relaxed waiver regime. Instead he was scrupulous about all but one rule – the one about not escaping during the review process. The one that the state courts would be *least* likely to excuse in the exercise of their discretion. The notion that he picked *that* rule to violate, in reliance on relaxed waiver, is ludicrous.

In any case, whatever expectations Kindler might have acquired, as the relaxed waiver practice developed over time, are irrelevant here. Kindler devotes a substantial portion of his brief to his view of the history and ramifications of relaxed waiver as it spanned two decades of Pennsylvania jurisprudence. There is also an "Attachment" to the brief, with several additional pages of argument and citation relating to relaxed waiver.[16]

As Kindler has regularly noted, however, the adequacy of a state procedural ground must be assessed under state law *as it existed at the time of the default*. Kindler's default – his flight – began in 1984. Of the 90 relaxed waiver cases discussed in the "Attachment" to his brief, 89 were decided *after* he fled. The one remaining case, *Commonwealth v. Frey*, 475 A.2d 700, 707 n.4 (Pa. 1984) (emphasis supplied), said only that "there is a *limited* relaxation of the waiver rules in death penalty cases" for "*significant*

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[16] *But see* Sup. Ct. Rule 24.3.

issues."[17] That narrow language would have been awfully thin ice on which to base an expectation that every kind of default, including even a prison breakout or two, would automatically be absolved.

C. Rulings like this one destroyed relaxed waiver.

Kindler contends that he is doing a favor for the disfavored by seeking an adequacy standard that would make state procedural defaults onerous to defend and easy to overcome. In practice his approach has just the opposite effect. Relaxed waiver has been a case study.

The Pennsylvania Supreme Court began its relaxed waiver experiment in the hope of preventing a miscarriage of justice in those few cases where a meritorious claim would otherwise slip through the cracks. As the federal courts increasingly relied on relaxed waiver to declare state procedural rulings in capital cases "inadequate," the state court took note.[18]

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[17] *Accord Commonwealth v. Zettlemoyer*, 454 A.2d 937, 955 n.19 (Pa. 1982); *Commonwealth v. Stoyko*, 475 A.2d 714, 720 (Pa. 1984).

[18] *See, e.g., Commonwealth v. Steele*, 961 A.2d 786, 837-38 (Pa. 2008) (Castille, C.J., concurring, with McCaffery, J.) (remarking on "the federal courts' seeming receptiveness to theories allowing them to ignore Pennsylvania state court procedural defaults.... [T]he result can be very bad law, since every state court response to a particularly egregious, unusual circumstance will be argued, in federal court, as proof that state rules of procedural default are uneven and should not be honored"); *Commonwealth v. Gibson*,

In the end, the court was rendered incapable of enforcing many rules as they applied to the class of litigants – capital defendants – with the greatest incentive to defy them. Now there is no more relaxed waiver. The state court abolished it to restore a degree of order to the capital litigation process.

The same progression is inevitable elsewhere. State judges (elected though they may be) are able to get the message: eliminate discretion, latitude, and leniency in the operation of procedural requirements, because diversity of outcomes will be interpreted on federal habeas review as inconsistency of application. But courts still need rules in order to function properly. If they are not permitted to use flexible rules, they will make inflexible rules rather than have no rules.

A proper formulation of the adequate state grounds doctrine can avoid the boomerang effect. If a rule is deemed adequate where it provides reasonable notice and opportunity for compliance, the state courts will be free to exercise discretion under proper circumstances, to the benefit of deserving defendants. Joseph Kindler just is not one of those.

Conclusion

For these reasons and those in the Brief for Petitioners, petitioners respectfully request that this

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951 A.2d 1110, 1150 (Pa. 2008) ("The threat of dismissive federal responses to flexible state procedural rules can lead to state legislatures and courts adopting ever-more inflexible rules") (Castille, C.J., concurring, with McCaffery, J.).

Court reverse the judgment of the United States Court of Appeals for the Third Circuit, and deny the petition for writ of habeas corpus.

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AMICUS CURIAE BRIEF

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(4)

No. 08-992

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In the Supreme Court of the United States

JEFFREY A. BEARD, *Petitioner,*

v.

JOSEPH J. KINDLER, *Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, IDAHO, INDIANA, LOUISIANA, MINNESOTA, MISSISSIPPI, MISSOURI, NEBRASKA, NEW HAMPSHIRE, NEW MEXICO, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, UTAH, VIRGINIA, WASHINGTON, WEST VIRGINIA, AND WISCONSIN IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is a state procedural rule automatically "inadequate" under the adequate state grounds doctrine—and therefore unenforceable on federal habeas corpus review—because the state rule is discretionary rather than mandatory?

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INTEREST OF AMICI CURIAE

Amici curiae are States responsible for effective enforcement of their criminal laws. They therefore are interested in protecting state rules requiring orderly and timely presentation of claims in their criminal courts and preserving the finality of their criminal judgments. The decision of the Third Circuit Court of Appeals in this case, reviving in remote federal habeas corpus proceedings a claim forfeited by the criminal defendant under a state procedural rule, undermines fair and reasonable state-court procedure and frustrates the finality of state criminal judgments.

SUMMARY OF ARGUMENT

When a state court in fair proceedings decides that a criminal defendant has forfeited review of a federal claim by violating a neutral state procedural rule that afforded him a reasonable opportunity to present such a claim, the state court's decision is an "adequate" basis to impose a procedural bar against review of the claim in later federal habeas corpus proceedings.

A. Federal courts should exercise the greatest restraint before rejecting a state procedural-default ruling and exposing a final state criminal judgment to attack based on belated, stale, or tactically-withheld claims. Federal-state comity, first, enjoins the federal court to presume the good faith of the state courts in enforcing their procedural rules and to avoid unnecessary interference with the efficacy of state-court procedures. Traditional habeas corpus policy, further, reflects the primacy of the States' interest in the finality of criminal judgments. AEDPA, moreover, has reinforced federal deference to state criminal judgments; and intrusive federal rejection of state procedural rulings threatens to undermine the cornerstone reform enacted by Congress in that legislation. In light of these policies, the federal court ordinarily should simply accept a fair state-court procedur-

al decision, at least where it is based on a neutral rule the petitioner could have complied with, as an "adequate" ground for denying habeas corpus relief.

B. In particular, the federal habeas corpus court may not ignore the state procedural ruling, and consider the merits of the defaulted claim, just because the state rule by its terms on in practice allows for judicial discretion or flexibility in its enforcement. No federal interest justifies rejecting fair enforcement of a procedural-default rule that the defendant reasonably could have complied with but took on the risk of flouting instead. To the contrary, discretion, flexibility, and lenity in the state courts' enforcement of procedural-default rules work to the benefit of the federal claimant. In the habeas corpus context, moreover, the procedural rules attacked by petitioners often are those that simply impose some limits on generous "second bite at the apple" collateral challenges to the judgment. Nor should the States be constrained to adopt rigid or mechanistic procedural rules as a price for federal respect for final state-court criminal judgments that rest on fair procedural rules.

C. Federal scrutiny to detect "discretionary" or nonmandatory "inconsistent" enforcement of a State's procedural rules is a bankrupt enterprise anyway. It finds only scant and dubious support in this Court's "adequacy" precedents and even less in habeas corpus precedents. It spawns unreliable litigation that has broadly sabotaged state procedural rules in cases far beyond that of the allegedly aggrieved petitioner. It implies undue suspicion of the state courts and entangles federal courts in untenable second-guessing of state-court resolutions of state-law questions.

ARGUMENT

A FAIR PROCEDURAL-DEFAULT DECISION BASED ON A NEUTRAL RULE THAT AFFORDS THE DEFENDANT A REASONABLE OPPORTUNITY TO PRESENT HIS FEDERAL CLAIM IS "ADEQUATE" TO BAR THE DEFAULTED CLAIM IN HABEAS CORPUS PROCEEDINGS REGARDLESS WHETHER THE RULE IS "DISCRETIONARY" OR A FEDERAL JUDGE THINKS STATE COURTS APPLY IT "INCONSISTENTLY" UNDER STATE LAW

"No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* v. *United States*, 321 U.S. 414, 444 (1944); accord, *United States* v. *Olano*, 507 U.S. 725, 731 (1993). That principle operates fully at the intersection where state criminal judgments meet the federal writ of habeas corpus. There, it is well established, federal claims forfeited under state procedural law are procedurally "barred" from federal review too. *Coleman* v. *Thompson*, 501 U.S. 722, 729-732 (1991). The bar may be lifted only by a showing of a distinctive kind of "cause and prejudice" or "innocence." *Id.*

At that federal-state "flashpoint of tension," *Duckworth* v. *Eagan*, 492 U.S. 195, 211 (1989) (O'Connor, J., concurring), the procedural-bar principle is "primarily" informed by federalism and comity concerns protecting the States' interest in the finality of criminal judgments. *Coleman*, 501 U.S. at 730, 738-739. The principle also finds special support in the traditional habeas corpus "exhaustion of remedies" policy requiring petitioners to first present their federal claims to the state court in a proper way. *Id.*, at 731. Congress' modern reform of federal habeas corpus in the Anti-Terrorism and Effective Death Penalty Act of 1996 provides new and additional reasons for deferring to state-court judgments and promoting proper litigation of federal claims in state criminal courts.

A federal court, especially a habeas corpus court, should never grudgingly resist presuming the good-faith validity of a state-court procedural-default ruling imposed against a defendant who violated a state rule despite notice and opportunity to present claims such as his in compliance with it. Instead, in resolving the federal question of "adequate grounds," the habeas corpus court should recognize the state-court procedural ruling as "adequate" except in extraordinary circumstances. *See* Arg. A, *post*.

But many federal habeas corpus courts undermine the procedural-bar principle by withholding proper respect for such state-court rulings—like the Third Circuit did in this case. They deign to recognize the procedural-default decision only if the underlying state rule is immune from "discretion" that the federal court might perceive in so-called "irregular" or "inconsistent" applications of the rule in other cases. The Ninth Circuit, taking that view, has fixed in place an on-going wholesale repudiation of California's decades-old rules against unjustifiably delayed habeas corpus petitions, "successive" piecemeal petitions, and petitions based on claims omitted, despite their availability, in the earlier direct appeal. Nothing justifies hostile scrutiny of discretionary practices—practices that tend to benefit, not the State, but the federal claimant instead. *See* Arg. B, *post*.

Further, as illustrated by actual practice, review for "discretionary" and "inconsistent" enforcement of state procedural rules proves wasteful and unreliable—and amounts to untenable second-guessing of state courts on state-law questions. *See* Arg. C, *post*. This Court should put a stop to it.

A. Except in Rare Cases, the Federal Habeas Court Should Accept A State Court's Procedural-Default Ruling As "Adequate" to Bar the Forfeited Claim If the Petitioner Had a Fair Opportunity to Raise His Claim in Compliance with the State Rule.

1. Given the unquestioned validity of the procedural-bar principle, the main arguable reason for federal habeas corpus courts to scrutinize the state courts' independent procedural-default rulings for "adequacy" is to ensure that criminal defendants have a fair opportunity to obtain merits review of their federal claims in the "main event" state-court proceedings. See C. WRIGHT, E. MILLER, & A. COOPER, VOL. 16B, FEDERAL PRACTICE AND PROCEDURE 302, 307, 359-374 [§§ 4021, 4024], (2d ed. 1996); *Wainwright* v. *Sykes*, 433 U.S. 72, 88-90 (1977). Absent extraordinary circumstances—such as unconstitutional discrimination or irrationality in the application of the rule in the petitioner's case—that federal interest is satisfied when the State gives the claimant fair notice of the risk of default under the rule and fair opportunity to litigate his federal claim in conformity with it. At least in such circumstances, the state judgment serves as an adequate basis for the federal court to decline to review the federal claim. See VOL. 16B, FEDERAL PRACTICE & PROCEDURE 386-393 [§ 4027]. "Discretion" or perceived "inconsistency" in applying the rule in cases other than the petitioner's has nothing to do with it.

Petitioner Beard's merits brief (pp. 25 et seq.) and the Criminal Justice Legal Foundation's amicus curiae briefs in this case and in Philip Morris USA v. Williams, No. 07-1216, ,demonstrate that this Court's procedural-bar precedents, and the varying explanatory statements they contain, largely may be reconciled as consistent with a comprehensive basic rule. That is: to validate a state procedural ruling as "adequate," it suffices if the federal claimant is afforded (a) reasonable notice that his litigation conduct risks forfeiture of his claims and (b) reasonable opportunity to present his claim for merits review in

conformity with the rule. See *Parker* v. *Illinois*, 333 U.S. 571, 574-575 (1948); *Central Union Telephone Co.* v. *City of Edwardsville*, 269 U.S. 194-195 (1925). Although an inquiry simply into state-court "evasion" to discriminate against federal claims also may be sufficient, cf. *McKnett* v. *St. Louis & S.F. Rwy*, 292 U.S. 230, 233 (1934), a deferential "reasonable notice and opportunity" formulation fully suffices to protect federal interests in any event.

A non-grudging approach, treating as "adequate" a fair state-court procedural-default judgment based on an established and reasonable procedural rule, is most appropriate. "A State's procedural rules are of vital importance to the orderly administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system." *Lambrix* v. *Singletary*, 520 U.S. 518, 525 (1997). "Procedural rules, like the substantive laws they implement, are the products of sovereignty and the democratic process." *Lee* v. *Kemna*, 534 U.S. 362, 394 (2002) (Kennedy, J., dissenting). "Most state procedures are supported by various legitimate interests, so established rules have been set aside only when they appeared to be calculated to discriminate against federal law, or, as one treatise puts it, that they did not afford a reasonable opportunity to assert federal rights." *Id.* (citing VOL. 16B, FEDERAL PRACTICE & PROCEDURE 392 [§ 4027]).

Further, the State courts are the ultimate and authoritative expositors of state law. *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1974). So, when a state court adjudges that a state procedural rule works a forfeiture of a criminal defendant's federal claim, a federal court hardly may deny the validity of the ruling as a final resolution of the state-law question. See *Estelle* v. *McGuire*, 502 U.S. 62, 67 (1991). And, in the absence of proof by the defendant, the federal court should never assume that such a state procedural-law decision was unconstitutional. See *Johnson* v. *Zerbst*, 304 U.S. 458, 468-469 (1938). It would be illogical for the federal court—bound to accept the state procedural-ground ruling as correct, authoritative, and presumptively constitutional—to nevertheless refuse to

accept it as the final and sufficient word on the procedural point. Absent an extraordinary showing, such as unconstitutionality in the state ruling, the federal court safely may resolve the federal "adequate grounds" question by, at least, validating a fair state procedural decision based on a rule that gave the defendant a reasonable opportunity to obtain a merits ruling on his federal claim.

2. Accepting common state procedural rulings as "adequate" follows, in any event and in particular, from this Court's habeas corpus cases and the policies that undergird them.

a. Even in the absence of an actual state-court ruling, this Court without further inquiry has imposed procedural bars on habeas corpus claims when it appeared they would be subject to default under the facial terms of a state procedural law. E.g., *O'Sullivan* v. *Boerckel*, 526 U.S. 838, 848 (1999); *Gray* v. *Netherland*, 518 U.S. 152, 162 (1996). Also, in *Teague* v. *Lane*, 489 U.S. 288, 297-298 (1988), this Court barred the petitioner's claim in light of his failure to raise it in state trial and appellate proceedings, as required by state law, despite the state-law "fundamental fairness" exception for defaulted claims. The Court, that is, did not inquire further into the state court's administration of that exception to see if the state rule otherwise might prove "inadequate." See also *Engle* v. *Isaac*, 456 U.S. 107, 125 (1982); but see *Wainwright* v. *Sykes*, 433 U.S. at 85-86.

b. Most fundamental, the nature of federal habeas corpus review of final state criminal judgments militates against promulgating additional pre-conditions for recognizing the "adequacy" of state procedural-default judgments based on fair rules. The procedural-bar principle in habeas corpus is "primarily" informed by federalism and comity concerns protecting the States' strong interests in the finality of criminal judgments. *Coleman*, 501 U.S. at 730, 739. Further, disrespect for a state court's procedural rulings conflicts with the traditional habeas corpus policy requiring petitioners to "exhaust" available remedies by properly presenting their federal claims to the state courts. *Coleman* v. *Thompson*, 501

U.S. at 731-732. Now, under AEDPA, the procedural-bar principle has become even more significant. Through AEDPA, Congress meant "to give effect to state convictions *to the extent possible under law.*" *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000) (emphasis added). And that AEDPA policy, in turn, informs the interpretation of traditional habeas corpus questions, *Calderon* v. *Thompson*, 523 U.S. 538, 554 (1997), such as that of procedural bar.

Moreover, improper federal-court rejection of fair and neutral state procedural-default rulings—by attaching to them unnecessary and non-constitutional "adequacy" pre-conditions—threatens the cornerstone AEDPA reform of habeas corpus. Under 28 U.S.C. § 2254(d), the federal court must broadly defer to state court adjudications of federal claims "on the merits." But, when a federal court fails to defer to a state-court default decision—even though a procedural ruling rather than a merits ruling—it abets the petitioner in seeking to circumvent the § 2254(d) deferential-review standard that restricts the availability of the writ on his claim. For federal appellate courts have held that, when a state procedural ruling is deemed "inadequate," it obviates the § 2254(d) deference that otherwise would govern claims adjudicated on the merits upon procedurally-correct "fair" presentation to the state court. See *Pirtle* v. *Morgan*, 313 F.3d 1160, 1167-1168 (9th Cir. 2002); *Fisher* v. *Texas*, 169 F.3d 295, 299-303 (5th Cir. 1999); *Moore* v. *Park*, 148 F.3d 705, 708, 710 (7th Cir. 1998). In undermining the exhaustion rule and menacing the deference standard, cavalier or grudging treatment of a state court's procedural-default ruling has become doubly and triply objectionable under AEDPA.[1]

c. That federal courts should accord state procedural decisions utmost respect in habeas corpus cases follows,

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[1] For qualifying *capital* cases, AEDPA provides that, absent narrow exceptions, "the district court shall only consider a claim or claims that have been decided on the merits in the State courts." 28 U.S.C. § 2264(a).

also, from the fact that the underlying state procedural rule in federal habeas corpus cases often will peculiarly be one that merely imposes some limits on "second bites" or "third bites at the apple" in generous post-trial and post-appeal proceedings in state court. Unlike in cases emanating from state civil courts or in direct appeals, many procedural-default judgments that make their way from state criminal courts into federal habeas proceedings are founded in rules against using state collateral proceedings as a "second appeal" or abusing the state habeas corpus writ through "untimely" and "successive" state collateral attacks on the final criminal. That counsels strongly in favor of barring the claim in the absence of a showing of "cause and prejudice." See *McCleskey* v. *Zant*, 499 U.S. 467, 486, 493 (1991); *United States* v. *Frady*, 456 U.S. 152, 165-166, 167-169 (1981). In view of such uniquely enhanced opportunities to challenge the judgment at the state end of the process—and the "cause and prejudice" and "miscarriage of justice" exceptions to any resulting procedural bar at the federal end—there is no need for intrusive scrutiny of "adequacy" in the middle.

3. A rule prescribing a deferential federal attitude towards state procedural-default rulings in state criminal cases finds added support in the attitude of the federal courts toward defaults in federal criminal cases. Federal appellate courts routinely treat a federal defendant's proven violation of established federal procedural rules, such as that requiring a contemporaneous objection to claimed error at trial, as sufficient to bar review of the claim on appeal. See *United States* v. *Olano*, 507 U.S. at 732. State-court procedural rulings are fundamentally like those made by federal courts in federal criminal cases. So, for example, the rules recognized in *McCleskey*, 499 U.S. at 486; *Frady*, 456 U.S. at 167-169, and *Davis* v. *United States*, 411 U.S. 233, 241-242 (1973)—requiring a "cause and prejudice" showing before permitting habeas corpus review of claims that should have been raised by pre-trial objection or in a federal appeal or in a first federal petition—should apply equally and presumptively in habeas corpus review of claims defaulted under similar

state-law rules. For it would offend comity if the federal court were to afford less respect to state-court procedural rulings than it does to its own. *Francis* v. *Henderson*, 425 U.S. 536, 541-542 (1976).

4. The better "adequacy" rule of non-intrusive acceptance of the state decision in cases at least where the defendant had a chance to raise the pertinent kind of federal claim under state procedural law—a rule of great deference—accounts for the possibility of unconstitutionality tainting a state court's procedural decision. Further, twin exceptions, for "cause and prejudice" and proof of the defendant's innocence, remain fully adequate safeguards against injustice.

a. Thus, the deference advocated by amici would conform to *Lee* v. *Kemna*, 534 U.S. 362. There, the in-trial suddenness of the disappearance of the defendant's alibi witnesses made it impossible for his lawyer to strictly comply with the ordinarily adequate state rule requiring written motions for continuances supported by sworn testimony establishing the likely availability of the witnesses at the subsequent trial date. In addition, the default in that case occurred at the "main event" criminal trial rather than in extra-constitutional post-trial or post-appeal proceedings. Amici's argument, also, is consistent with *Cone* v. *Bell*, 129 S.Ct. 1769 (2009). There, the federal court erroneously imposed a bar because the petitioner, having once properly raised his federal claim in state court, went ahead and raised it again. Such retroactive invalidation of his earlier proper attempt to raise the claim in effect deprived him of that first fair opportunity to comply. Further, as this Court ruled, the "twice raised" justification for not re-ruling on the same claim did not amount to a "procedural default" ruling forfeiting the claim under state law in the first place. *Id.* at 1782 ("the Tennessee appellate court did not hold that Cone's *Brady* claim was waived").

b. The better, deferential view of state procedural rulings in habeas corpus cases, of course, admits exceptions for cases, doubtlessly rare, of federal-law violations—such as for unconstitutional discrimination or ir-

rationality in the application of the rule in the petitioner's case. In criminal cases, a state-court procedural ruling normally will not be governed directly by any federal statute or regulation.[2] Given the lesser nature of any arguable liberty interest in state habeas corpus proceedings, see *District Attorney's Office for the Third Judicial District* v. *Osborne*, 129 S.Ct. 2308, 2319 (No. 08-6) (June 18, 2009), direct federal limits on the state courts almost invariably will consist only of the basic guarantees of the United States Constitution. Either way, where a habeas corpus petitioner shows that the state court's procedural ruling violated important federal rights, he justifiably will avoid imposition of any resultant procedural bar in the federal court.

c. And, of course, the procedurally-barred federal habeas corpus petitioner retains an opportunity to show "cause and prejudice" or a "miscarriage of justice" in order to lift the bar and permit review of his claim despite his state-court default. See *Wainwright* v. *Sykes*, 433 U.S. at 90-91. Their availability serves as yet another reason why the federal court's review of the "adequacy" of state procedural rulings should be highly deferential. Because these exceptions enable the federal court to take cognizance of "good cause" and injustice, there is even less reason for federal judges to police the way state courts administer, in their discretion, state procedural rules that also admit similar discretionary exceptions. *See* Arg. B, *post*. Such state-law exceptions often might prove more solicitous of the federal claim and the federal claimant than the exceptions this Court has recognized as effective safety-valves under a well-functioning procedural-default principle.

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[2] But see *Davis* v. *Wechsler*, 263 U.S. 22 (1923); *People* v. *Otto*, 2 Cal.4th 1088, 831 P.3d 1178 (Cal. 1992). Also, in one rare case—*Smith* v. *Texas*, 550 U.S. 297 (2007)—the state court's procedural ruling was based on a misunderstanding of this Court's constitutional decision, validating the defendant's original rule-compliant objection, handed down in the direct appeal in the same case.

B. Federal Habeas Corpus Review for "Discretion" or Perceived "Inconsistency" in the State Court's Application of a Neutral Procedural Rule Serves No Sufficient Federal Interest.

Despite the merits of a rule favoring respect for any fair and reasonable state procedural rule, many federal courts of appeals take an adversarial or intrusive attitude. They endorse, by word or practice, the erroneous notion that a state procedural default decision may be "viewed in federal habeas corpus with a healthy degree of skepticism."*Anderson* v. *Attorney General of Kansas*, 342 F.3d 1140 (10th Cir. 2003). A chronic manifestation of that attitude are federal court demands that, to support procedural bars in federal habeas corpus, state procedural rules may not be "discretionary." *Doctor* v. *Wallace*, 96 F.3d 675, 685-686 (3d Cir. 1996); *Valerio* v. *Crawford*, 306 F.3d 742, 776-778 (9th Cir. 2002). Or, in another way of phrasing the rejection of state rules on account of "discretion," some federal courts improperly police whether the state courts sometimes ignore the procedural rule, forgive its violation, or find it inapplicable for case-specific reasons under general "reasonableness" or "interest of justice"-type standards. They demand that state rules must be "strictly" followed or "regularly" and "consistently" applied—at least insofar as the federal court perceives it from a distance—to "the vast majority of similar claims." See *Williams* v. *Puckett*, 283 F.3d 272, 280 (5th Cir. 2002); *Clay* v. *Norris*, 485 F.3d 1037 (8th Cir. 2006); *LaCrosse* v. *Kernan*, 244 F.3d 702, 704 (9th Cir. 2001). The Ninth and Tenth Circuits have gone so far as to place upon a State the ultimate burden of proving the "adequacy" of a state-court's standard and reasonable procedural rules See *Bennett* v. *Mueller*, 322 F.3d 573, 585 (9th Cir. 2002); *Hooks* v. *Ward*, 184 F.3d 1206, 1217 (10th Cir. 1999).

Contrary to calls for "healthy skepticism," federal court suspicion of state court procedural decisions is unhealthy. Although it is hard to identify a compelling one,

there perhaps might exist other prudential requirements for "adequacy" beyond that of reasonable notice of the default risk and fair opportunity to litigate the federal claim. Regardless, scrutiny of judicial "discretion" in the administration of a state procedural rule, or arguably "inconsistent" applications of the rule that might result from such discretion, are in no event a right part of the inquiry.

1. This Court has never rejected a state procedural-default decision as "inadequate" to bar a federal habeas corpus claim merely on account of "discretionary," or "inconsistent," enforcement of state procedural rules in the state court. Nor has this Court in its habeas corpus procedural-bar cases stayed its hand in imposing a bar until the State had first satisfied a burden of proving "non-discretionary" or "consistent" application of the rule in the run of other state cases.

This Court, it is true, looked at evidence of the state courts' broader enforcement of a procedural rule in *Dugger* v. *Adams*, 489 U.S. 401, 410 n.6 (1989), and *Wainwright* v. *Sykes*, 433 U.S. at 85-86. Cf. *Johnson* v. *Mississippi*, 486 U.S. 578 (1988)[3]. In neither case, however, did the Court reject the state procedural rule. *Sykes* merely noted that the state courts had applied the rule in other cases. *Adams*, observing that the rule in fact had been applied by the state court "in the vast majority of cases," merely explained that cases to the contrary were not "sufficient to undercut the adequacy" of the state-court decision. (In *Adams*, this Court pointed out that the Florida Supreme Court had often imposed forfeiture for belated *Caldwell* v. *Mississippi* claims in particular. But, unlike what the Ninth Circuit for example has done, *see*

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[3] Albeit from a Mississippi post-conviction proceeding, *Johnson* was in this Court on direct appeal from the state court. Further, it appears that the procedural rule cited by the state supreme court in that case was novel and contradicted the rule in existence at the time of the defendant's alleged default. So the rule likely would have been inadequate even under the fair notice/hearing standard amici discuss in this case.

pp. 21-23, *post*, this Court never even implied that a general state procedural rule might somehow become *per se* "inadequate" on a wholesale basis for *all* federal claims and for an open-ended period spanning decades.)

2. Nor should federal policy disfavor "discretion" or mercy—over rigidity and "mandatory" application—in the enforcement or relaxation of a state procedural rule. Discretion and potential exceptions are desirable feature that can mitigate the effect of such rules. Conversely, there is no reason why a litigant capable of complying with an established rule needs to know in advance the precise way discretion or excuse might work to mitigate his risk if, with fair notice of the rule, he decides to flout it.

a. A tempering judicial discretion broadly characterizes federal procedural rules. See *United States* v. *Olano*, 507 U.S. at 732 (discussing judicial discretion to relieve failure-to-object default under Fed. R. Civ. Pro. 52(b)); *United States* v. *Frady*, 456 U.S. at 162-163; *Davis* v. *United States*, 411 U.S at 241. In *Day* v. *McDonough*, 547 U.S. 198, 210-211 (2006), and *Granberry* v. *Greer*, 481 U.S. 129 (1987), this Court declined to require federal courts to address, *sua sponte*, statute-of-limitations and procedural-bar defenses when the State's representative fails to timely assert them; but the Court nonetheless allowed for "discretion" to consider those un-raised defenses on a case-by-case basis. Presumably, the State representatives would not prevail on the "gotcha!" argument that, because of that discretion, the federal courts now must always consider the State's un-raised defenses after all. Similarly, AEDPA's "statute of limitations does not begin to run "until the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). Nor has it always been clear, for purposes of applying this Court's exceptions to the procedural-bar principle, precisely what factual circumstance qualify for "cause," see *Reed* v. *Ross*, 468 U.S. 1, 13 (1984), or what standard determines "prejudice," see *United States* v. *Frady*, 456 U.S. at 170. Amici are

unaware of any federal doctrine restricting enforcement of these various federal procedural rules unless the federal court can demonstrate that the rules are not "discretionary" and that it has "strictly" or "regularly and consistently" applied them in the "vast majority" other cases. In fact, the Ninth Circuit has reserved for the federal court discretion to reject a "defaulted" habeas corpus claim on the merits where application of the procedural-bar doctrine appears to be complicated, *Franklin* v. *Johnson*, 290 F.3d 1223, 1232 (9th Cir. 2002)—the very kind of cost-free exercise of discretion to ignore a procedural bar that it treats with undue suspicion when the state court does it.

b. The same kind of discretion and lenity characterize state procedural-default rules too. For example, although California allows criminal defendants to bring collateral habeas corpus challenges to their convictions, those challenge must be made "without substantial delay" after the defendant reasonably should have been aware of the bases for his claim. After that, claims unjustifiably raised in late or successive petitions are barred. Some case-by-case judgment necessarily informs the determination whether a claim was unreasonably delayed—or whether other circumstances make out an exception to the rule. See *In re Clark*, 5 Cal. 4th 750, 855 P.2d 729 (1993). And, as in this case, Pennsylvania and Wisconsin allow for discretion in judicial enforcement of their rules barring review of the defendant's claims when he escapes from custody after conviction. Ohio Appellate Rule 5(A), as another example, provides for judicial discretion to allow the defendant to file a late appeal.

All this should be encouraged. Yet federal courts instead have refused to honor state-court decisions imposing procedural defaults under these rules because of what should be seen as laudable discretion in adjudging or forgiving violations. See *Morales* v. *Calderon*, 85 F.3d 1387, 1391-1393 (9th Cir. 1996); *Kindler* v. *Horn*, 542 F.3d 70 (3d Cir. 2008); *Braun* v. *Powell*, 227 F.3d 908, 913-914 (7th Cir. 2000); *Dietz* v. *Money*, 391 F.3d 804, 811 (6th Cir. 2004).

If respondent were to succeed in his perverse attack on the kind of "discretion" that might mitigate the effect of a defendant's decision to flout a state procedural rule, habeas corpus petitioners will be enabled in challenging the effect of all sorts of well-established and reasonable state rules. See, e.g., Ala. Crim. Pro. R. 32, 35 ("good cause" and "diligence" standards for second-appeal and successive petitions); Colo. R. Crim. Pro. 35(c)(2) ("interest of justice"); *People* v. *Scheer*, 184 Colo. 15, 20, 518 P.2d 833, 835 (1974) ("special circumstances" excusing successive petition); Colo. Rev. Stats. Ann. § 16-5-402(1) ("justifiable excuse" or "excusable neglect'" for statute-of-limitations violation); Conn. Practice Book § 23-29(3) (successive-petition bar inapplicable for claim not "reasonably available" earlier); Del. Superior Ct. Crim R. 61(i)(2, 5) ("cause and prejudice" and "fundamental miscarriage of justice" exceptions to successive-petition bar); Fla. R. Crim. Pro. 3.850(b) (limitations-period bar excused for claim undiscovered despite "diligence"); Ga. Stats. § 9-14-47.1 (successive-petition bar lifted if facts could not "reasonably" have been asserted in first petition); Hawaii Penal R. 40(a) ("extraordinary circumstances" for second petition); Idaho Code §§ 19-4901(b), 19-4908 ("reliability" and "diligence" components of exception to no-second-appeal rule; "insufficient reason" precludes successive petition); 725 Ill. L. C. S. § 5/122-1 ("no culpable negligence" and "fundamental fairness" exceptions to statue-of-limitations and successive-petition rules); Indiana Post-Conviction R. PC 1(8) ("sufficient reason" for second petition); Iowa Code Ann. § 822.8 ("sufficient reason" exception for successive petition); Kan. Stats. Ann. § 60-1507(c) (court not "required" to consider successive petition); Ky. R. Crim. Pro. 11.42(10) (limitations-period bar lifted for facts defendant could not "reasonably" have known); La. Crim. Pro. Code, Art. 930.4 ("interests of justice" exception to no-second-appeal rule; "inexcusably omitted" standard for successive petitions); 15 Me. Rev. Stats. Ann. § 2128 (no second appeal unless "excusable"); Md. Code Crim. Pro. 7-103, 7-104 ("interest of justice" exception to successive-

petition rule; "extraordinary cause" exception for statute of limitations); Mass. R. Crim. Pro. 30(c)(2) (judicial "discretion" to allow successive petition); *Spears* v. *State*, 725 N.W.2d 696, 700 (Minn. 2006) (limited-situation "fairness" exception for successive-petition and second-appeal procedural-bars if default was not deliberate and "inexcusable."); Miss. Stats. § 99-39-21 ("cause and prejudice" requirement for second appeal); Mont. Code Ann. § 46-21-105 (no successive petition unless claims "could not reasonably have been raised" in first petition); Nev. Rev. Stats. § 34.724 (statute-of-limitations bar lifted where delay not defendant's "fault"); N.J. R. of Ct. 3:22-4 (successive-petition and second-appeal bars lifted for "fundamental injustice"); N.Y. Crim. Pro. L. § 440.10(c) ("interest of justice" discretion to lift successive-petition bar); Vt. Stats. Ann. § 7134 (court "not required to entertain successive petitions"); Wisc. Stats. § 974.06(4) (no successive post-conviction motions unless "sufficient reason" shown); Wash. Rev. Code § 10.73.140 (successive petitions barred unless "good cause" shown why not raised earlier"); see also Ohio Rev. Code § 2953.23.

3. Language in this Court's civil and direct-appeal jurisprudence outside the habeas corpus criminal context— see, e.g., *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 234 (1969) ("discretionary"); *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964) ("not strictly or regularly followed"); *Williams* v. *Georgia*, 349 U.S. 375, 383 (1955) ("matter of discretion")—does not compel the conclusion that "discretionary" state procedural rules giving rise to so-called "inconsistent" decisions are "inadequate" to bar federal habeas corpus review of a "defaulted" federal claim. Transporting civil-case or direct-appeal "adequacy" principles into habeas corpus proceedings is not automatic. See, e.g. *Coleman* v. *Thompson*, 501 U.S. at 741. The nature of habeas corpus requires the relaxation of many legal principles that otherwise would work more indifferently to the States' interests in other contexts. For example, the "harmless error" standard is strict on direct appeal but more forgiving on habeas corpus. See *Fry* v. *Pliler*, 551 U.S. 112 (2007). Also, unlike in direct

appeals, constitutional rights newly recognized or expanded by the courts rarely apply retroactively to support relief in habeas corpus cases. See 28 U.S.C. § 2254(d); *Teague* v. *Lane*, 489 U.S. at 299-316 (plurality op.); see also *Stone* v. *Powell*, 428 U.S. 465, 474-495 (1976) (Fourth Amendment exclusionary-rule claims not cognizable in habeas corpus).

It would be worse than ironic to transform language about "discretion" and "consistent" application into a rule of inadequacy in modern habeas corpus cases. The argument for doing so may be traced to race-tinged civil-rights cases from the 1950's and 1960's where recalcitrant courts trotted out novel procedural "rules" as pretexts for defeating unpopular federal claims or claimants. Given certain societal progress in racial matters since then, see *Northwest Austin Municipality District* v. *Holder*, 129 S.Ct. 2504, 2511-2512 (No. 08-322) (June 22, 2009), any need for such scrutiny has diminished. As this Court recognizes, and as Congress recognized in AEDPA, state courts are "co-equal" parts of our national judicial system and give serious attention to their responsibilities to enforce the federal constitution. *Sawyer* v. *Smith*, 497 U.S. 227, 241 (1990).

Upon proof of unconstitutional state process, of course, the state procedural bar would fail. *See* Arg. A, *ante*. But there is no constitutional infirmity in "discretion" or "inconsistency" in state judicial decisions applying state law to case-specific facts. *Engle* v. *Isaac*, 456 US at 121 at n. 21; *Beck* v. *Washington*, 369 U.S. 541, 554-555 (1961); *Gryger* v. *Burke*, 334 U.S. 728, 731 (1947). Invidious-discrimination concerns that might have affected the civil-rights-era precedents should not be employed now to condemn modern state-court procedural decisions for the opposite reason of state-court leniency toward federal claimants. Instead, where the defendant has fair notice of the rule and the risk of forfeiture it presents, and a fair opportunity to comply, federal courts should laud state-court "discretion" and occasional acts of lenity that may further promote the vindication of federal rights.

4. Such a "no good deed goes unpunished" prescription for state procedural law is objectionable for related reasons. It would discourage flexible consideration of case-specific circumstances that otherwise might reasonably be accepted by a state court as excusing or mitigating a defendant's procedural violation. And it would set up a perverse incentive for States to clamp down by enacting rigid and mechanical rules that admit of no judgment or discretionary exception. See, e.g., *Fearance* v. *Scott*, 56 F.3d 633, 642 (6th Cir. 1995) (state procedural default rule became "adequate" once state law eliminated judicial discretion to consider "successive" habeas corpus petitions).

For example, like in the federal system and like in many other States, California affords a criminal defendant appellate review of his conviction but requires claims based on the appellate record to be raised in the direct appeal and not later in a collateral habeas corpus proceedings. *In re Dixon*, 41 Cal.2d 756, 759, 264 P.2d 513 (1953); see *United States* v. *Frady*, 456 U.S. at 167. Yet, in a case in which the California Supreme Court deemed to be defaulted previously-available appellate-record claims raised by the defendant only in a later *second* habeas corpus petition, the Ninth Circuit rejected the state-court procedural ruling on the asserted ground that the scope of a "special circumstances" exception to the rule was insufficiently clear. *Fields* v. *Calderon*, 125 F.3d 757, 760 (9th Cir. 1997). The Ninth Circuit did this even though the rule made the risk of default palpable and nothing prevented the defendant from raising his claim in his direct appeal fifteen years earlier. The case returned to the district court for another ten years, and only became final with the denial of Fields' certiorari petition last year. *Fields* v. *Ayers*, 128 S.Ct. 1875 (2008). California's legitimate interests—in finality and in orderly state-court procedures promoting timely presentation of claims when they are fresh and when reliable re-trials remain practical—would have been better served by a mechanistic no-exception rule.

5. To put it bluntly: Federal scrutiny for mere "discretion" or "inconsistent" application of a reasonably clear state-law rule serves little if any purpose, and is insufficient to override the finality interests that characterize habeas corpus. Where a state criminal defendant or habeas corpus petitioner has fair notice of a procedural pre-requisite for preserving review of his federal claim, yet flouts the rule, he has no legitimate complaint when the state court predictably invokes the rule in his case. Whether he or a federal court believes that other litigants escaped forfeiture in seemingly similar circumstances cannot justify the petitioner's decision to ignore the rule as if in daring the state court to enforce it.

a. Respondent might argue that uncertainty in the enforcement of a rule might make it impossible for a litigant to determine what he needs to do to comply with it. But, as amici acknowledge, to be "adequate" a procedural rule must give the litigant an opportunity—including reasonable notice—to obtain merits review of his federal claim in compliance with the rule. In an extreme case of abandonment or "unforeseeable" and "freakish" enforcement of a rule, it might not qualify as affording fair notice. See *Prihoda* v. *McCaughtry*, 910 F.3d 1379, 1385 (7th Cir. 1999); see also *Judd* v. *Haley*, 250 F.3d 1308, 1313 (11th Cir. 2001).

But that does not mean that procedural rules requiring "reasonableness" or "diligence" from the litigant in presenting his claim in a timely way rather than belatedly are "inadequate." Our legal system often requires "reasonable" conduct from citizens—for example, holding them liable in tort for "unreasonable" negligence, and holding them criminally culpable for violence even where they honestly but "unreasonably" act in the perceived need to defend themselves from attack. A "reasonableness" standard does not suddenly become indefensible in a procedural rule rather than in a substantive rule.

Still less might a general "reasonableness" or "interest of justice" standard undermine "adequacy" when those standards describe merely what "exceptions" might apply to mitigate or excuse a violation of an other-

wise sufficient rule giving fair notice of required procedure. No imperative requires the federal court to override a state law procedural ruling imposed against a litigant who, with notice of the risk that a violation will work a forfeiture of his claim, ignores or flouts the rule as if to dare the state court to enforce it. Yet, in *Smith* v. *Black*, 970 F.2d 1383, 1387 (5th Cir. 1992), the federal court relieved the petitioner from his state-law default, despite a clear written rule requiring objection at trial and the raising of trial-record issues on appeal rather than in habeas corpus, because the state supreme court did not invoke the rule in some other cases raising the same underlying claim.

Constitutional fair-notice considerations protect a defendant from criminal conviction and imprisonment under "unexpected and indefensible" judicial constructions of a state penal statute. *Rogers* v. *Tennessee*, 532 U.S. 451, 462 (2001) A defendant and eventual habeas corpus petitioner does not require significantly different or greater protection for his choice to push the envelope and to risk flouting a state procedural rule giving him notice of the potential cost.

b. It might be said that, where a State fails to treat its own procedural rules seriously, there is no reason the federal courts should treat them seriously either. Or that, where a state has completely or virtually abandoned enforcement of a procedural-default rule, a litigant might be unfairly deceived into believing that violating the rule entails no substantial risk of forfeiture. But neither the mere exercise of discretion, nor so-called "inconsistent" applications of rule that continues to be enforced to any significant degree, can demonstrate that a state court has abandoned its rule or fails to take it seriously. A defendant cannot be deceived by mere "discretion" or "inconsistency" in a rule that is enforced often enough to give him fair notice that non-compliance risks default.

Nevertheless, the Ninth Circuit in *Insyxiengmay* v. *Morgan*, 403 F.3d 657, 666-667 (9th Cir. 2005), refused to respect the Washington Supreme Court's ruling that the petitioner's post-conviction pleading was filed too late

under the state statute of limitations. Nothing in the state rule could have misled the petitioner into believing he could afford to delay until the very end of the one-year limitations period and then merely deliver his petition to prison authorities rather than file it in court. But the Ninth Circuit held that the procedural ruling was inadequate because the State, on which the Circuit had imposed the burden of proof, did not negate the possibility that the limitations period perhaps might be extended under some kind of "mail-box rule"—speculation that the Washington Supreme Court ultimately debunked under the "plain language" of the state appellate rules. See *In re Carlstad*, 150 Wash.2d 583, 590-593, 80 P.3d 587, 590-592 (Wash. 2003).

c. Nor is there good reason to believe that discretionary state procedural-default rules might be aimed peculiarly at federal rather than state claims. Respondent Kindler would be hard pressed to show that the States have adopted procedural rules disadvantaging the litigation of federal claims specifically. To the contrary, a state court's enforcement of a procedural-default rule against a criminal defendant's federal claim would most naturally sweep up related state claims, affording the defendant more protection than the federal constitutional minimum, at the same time. Nothing inherent or common in state procedural-default rules, and nothing in the mere exercise of judicial discretion in administering them, would tend to exert an adverse disparate impact on federal claims in particular.

C. Federal-Court Scrutiny of Whether a State Procedural Rule Proves "Discretionary" or "Inconsistent" In Application Results in Wasteful Litigation and Entangles the Federal Court in Untenable Second-Guessing of State-Law Rulings.

An unfriendly standard of review, demanding that state judgments reflect "mandatory" or "strict application" or the federal court's view of "consistency" and "regularity" under the state's discretion-mitigated proce-

dural law, predictably produces strange and "exorbitant" results.

1. That is the case in, for example, the Ninth Circuit. In 1940, the California Supreme Court announced that a petitioner may not challenge his conviction in piecemeal "successive' petitions. *In re Connor*, 16 Cal.2d 701, 705, 108 P.2d 10 (Cal. 1940). In 1953, the state court announced that petitioners may not raise, in collateral habeas corpus, claims that could and should have been raised, based on the available trial record, in the direct appeal. See *Dixon*, 41 Cal.2d at 759, 264 P.2d at 514. In 1985, the California Supreme Court announced that habeas corpus petitions must be filed without "substantial delay"; and, in 1993, the state court indicated that a petition would be "presumptively timely" if filed within 90 days after the reply brief in the direct appeal. See *Clark*, 5 Cal.4th at 784, 855 P.2d 729. Each of these rules admits some "exceptions" that call for judicial consideration of reasonable justification.

But, the Ninth Circuit has invalidated these rules, for procedural-bar purposes, on grounds of alleged uncertainty about when a petition becomes "untimely" and alleged "inconsistency" in the application of the "exceptions." See *Fields* v. *Calderon*, 125 F.3d 762-763; *Morales* v. *Calderon*, 85 F.3d at 1390-1393; *Siripongs* v. *Calderon*, 35 F.3d 1308, 1318 (9th Cir. 1994). Although the invalidation of these rules purportedly applies to defaults circa 1993 and before, the actual impact is worse. Because the Ninth Circuit has never subsequently honored state procedural decisions based on any of these rules, it in effect has neutralized them on a wholesale and continuing basis, for all cases and all claims spanning approximately the last two decades or more. Nothing in this Court's jurisprudence supports such a pervasive across-the-board and on-going nullification of the procedural-bar effect of a State's basic appellate and habeas corpus rules.

The road to proving anew that these rules have become "adequate" is tortuous indeed. *Martin* v. *Walker*, U.S. Dist. Ct. No. CIV S-99-0223 (E.D. Cal.) illustrates this. After Martin's murder conviction had been upheld

on appeal, the California Supreme Court denied further direct review in 1997 and then denied habeas corpus relief in 1998. When Martin raised new "unexhausted" claims in a later federal petition, the federal court stayed the proceedings to give Martin another opportunity to present those new claims in state court first. But Martin hardly could have explained and justified his three-and-one-half year post-appeal delay, for he was raising new claims of ineffective trial and appellate counsel even though he earlier had proved able to raise similar claims of ineffective trial and appellate counsel. As it happened, he offered no explanation at all. So the California Supreme Court rejected his claims on grounds of procedural default. The district court, in turn, imposed a procedural bar against those claims.

But, under its decision in *Bennett* v. *Mueller*, 322 F.3d 573, the Ninth Circuit reversed and placed the burden on the State to show that its timeliness rule was clear after *Clark* "and that it has been consistently applied." Given the "logic" stemming from the faulty premise that "discretion" resulting in alleged "inconsistency" renders a rule "inadequate," the State's representatives understandably were constrained to attempt a painstaking analysis of a large swath of state-court rulings in other cases. See *Powell* v. *Lambert*, 357 F.3d 871, 872 (9th Cir. 2004). The State investigated a sample of 370 habeas cases dismissed by the supreme court near the time of Martin's default, culling those filed by petitioners who, like Martin, also had filed previous appeals. Delving further into the sub-set of petitions filed, like Martin's, more than three-and-one-half years after the direct appeal, the State identified which ones had been denied by the supreme court with citations to the *Clark* "timeliness" rule and which ones had not. Then the State pored over the underlying details of the latter set of cases to demonstrate what case-specific circumstances explained the absence of an explicit invocation of the timeliness rule by the state court. (California has undertaken similar demonstrations. See, e.g., *Stanley* v. *Woodford*, No.CIV S-95-1500 (E.D. Cal.), *Kipp* v. *Ylst*, No. CV-03-8571 (C.D.

Cal.). The case is pending on appeal again.

It remains unclear, regardless how "consistent" state judicial decisions truly are, whether California ever could satisfy some federal courts. For, as in *Dennis* v. *Brown*, 361 F.Supp.2d 1124 (N.D. Cal. 2005), a federal court need only choose to demand written explanations from the California Supreme Court's procedural rulings in the hundreds of habeas corpus cases that crowd its docket. With such an impractical demand, the district court in *Dennis* has helped cement the Circuit's on-going wholesale refusal to honor state court decisions on basic state-court procedural questions.

Such untenable and wasteful litigation over "consistent application" is not unique to the Ninth Circuit. Other circuits have engaged in broad yet superficial calculations involving myriad state rulings to ward off or slay the chimera of "inconsistency." E.g., *Wright* v. *Quarterman*, 470 F.3d 581, 587-588 (5th Cir. 2006); *Franklin* v. *Anderson*, 434 F.3d 412, 420-421 (6th Cir. 2006); *Spears* v. *Mullin*, 343 F.3d 1215, 1254 (10th Cir. 2003).

Indeed, even where federal courts approve a state procedural rule as "consistently" applied, they leave the door open for new attacks based on later samples of state cases showing alleged relapse into "discretionary" and "inconsistent" results. See *Ortiz* v. *Stewart*, 149 F.3d 923, 932 (9th Cir. 1998); *Emory* v. *Johnson*, 139 F.3d 191, 201 (5th Cir. 1997). So, unjustifiable inquiry into the immaterial question of "consistent application" invites the worse prospect of permanent floating and open-ended relitigation based on arbitrary and infinite "moving average" snapshots of state court practice. If comity means anything, the State should not be forced to play a sudden-death game of "whack-a-mole" to vindicate the procedural rulings of its courts.

2. "Searching for 'regularity' in the state's employment of excuses and exceptions," further, "would embroil the federal court deeply in questions of state law and procedure." *Prihoda* v. *McCaughtry*, 910 F.3d at 1385. And that enterprise is off limits to federal habeas corpus courts. *Estelle* v. *McGuire*, 502 U.S. at 67.

Scott v. *Schriro*, 567 F.3d 573 (9th Cir. 2009), is an example of this. There, the Ninth Circuit refused to honor an Arizona preclusion ruling based on a state rule of court providing that, "[a]fter the filing of a post-conviction relief petition, no amendments shall be permitted except by leave of court upon a showing of good cause." The state court held that such an amendment could be authorized by the rule only *before* issuance of a dispositive order, not to vacate such an order dismissing the petition. The Ninth Circuit, however, held that the rule did not constitute an adequate state procedural bar because—under its own view of Arizona law—"[t]he only condition to amendment of a filed petition is the existence of good clause. Whether a court has or has not ruled on the original petition is not mentioned as a condition to amendment." *Id.* at 581-582.

Amici question whether this Court would view analogous Rule 15 of the Federal Rules of Civil Procedure as allowing a federal litigant to amend his complaint even after the district court had dismissed the proceedings. More to the point, the Ninth Circuit's rejection of the state ruling in *Scott* was based, improperly, on its own second-guessing of the Arizona court on a matter of Arizona law. See *Brown* v. *Secretary of the Department of Corrections*, 200 Fed. App. 885 (11th Cir. 2006) (unpublished op.) (federal court rejects state ruling on asserted ground that state court had incorrectly applied its own law); compare *Insyxiengmay* v. *Morgan*, 403 F.3d at 666-667 (federal court's view of Washington procedural rule) with *In re Carlstad*, 80 P.3d at 590-592 (Washington Supreme Court's contrary view).

Improper second-guessing on state-law questions necessarily occurs, moreover, whenever a federal court rejects a state procedural ruling by purporting to determine that discretion in state procedural rules has resulted in their "inconsistent" application. Such review is tantamount to re-determining whether the state courts had abused their discretion, as informed by state-law standards, in determining that the rule dictates forfeiture on the facts of the case at hand even though it might

not have done so on slightly different facts in other cases. It would be rather like concluding from a sampling of judicial opinions that, because a federal court in some cases suppresses evidence of a defendant's statements and in other cases admits it, the court has "inconsistently" applied the Fifth Amendment's prohibition against coerced confessions. Just as federal habeas corpus review of state court decisions for "abuse of discretion" is inappropriate as a ground for granting relief, see *Duncan* v. *Henry*, 573 U.S. 364, 366 (1995) (per curiam); *Schell* v. *Witek*, 218 F.3d 1017, 1025 (9th Cir. 2000) (en banc), it is too flimsy to support rejecting the state court's exercise of discretion as "inadequate" to support the state judgment and thus to expose a final state judgment to remote habeas corpus attacks based on delayed, withheld, or stale claims.

* * *

The comity-offending demand for non-discretionary or mandatory enforcement of state rules, as a price for federal respect for state-court procedural rulings, implies undue suspicion of the state courts, results in unreliable interpretations of state-law decisions, and undermines AEDPA's goals of "streamlining federal habeas corpus proceedings," *Rhines* v. *Weber*, 544 U.S. 269, 277 (2005), and giving "effect to state convictions to the extent possible under law," *Williams* v. *Taylor*, 523 U.S. at 404. Discretionary or not, the Pennsylvania procedural ruling, under which respondent forfeited his post-judgment claims on account of his escape and flight, is an adequate basis to support the state judgment and to trigger a procedural bar in the federal habeas corpus proceedings.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

JEFFREY A. BEARD, Secretary,
Pennsylvania Department of Corrections, *et al.*,
Petitioners,

vs.

JOSEPH J. KINDLER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

When state law provides both fair notice of the existence of a procedural rule and a reasonable opportunity to comply, is the state's default rule rendered "inadequate," for the purpose of subsequent federal habeas review, by discretion in its application or by the existence of exceptions not precisely defined in advance?

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IN THE

Supreme Court of the United States

JEFFREY A. BEARD, Secretary,
Pennsylvania Department of Corrections, *et al.*,
Petitioners,

vs.

JOSEPH J. KINDLER,
Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

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1. The parties have consented to the filing of this brief.

   No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

In the present case, the Court of Appeals declared the well-established state fugitive dismissal rule "inadequate" to support the judgment even though the defendant had more than fair notice that his escape could result in forfeiture of his claims. This decision impairs the finality of a valid state judgment, affirmed in an appeal that was more than fair to the defendant. The resulting inference with the execution of a well-deserved sentence for an especially heinous crime is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

In 1982, Joseph Kindler and two other men burglarized a Pennsylvania store. *Kindler* v. *Horn*, 542 F. 3d 70, 72 (CA3 2008). Two of the men were stopped by police during the getaway, but Kindler managed to escape. *Ibid.* One of the captured men, David Bernstein, identified Kindler as the mastermind behind the crime and the driver of the getaway car. *Ibid.* Immediately following his release on bail, Kindler devised a plan to kill Bernstein in order to prevent his testimony. *Ibid.* On July 25, 1982, Kindler and two accomplices beat Bernstein with a baseball bat, jabbed him with an electric prod, kidnapped him, and finally drowned him. See *id.*, at 72-73.

The jury convicted Kindler of first-degree murder and kidnaping, and fixed a sentenced of death. *Commonwealth* v. *Kindler*, 536 Pa. 228, 230, 639 A. 2d 1, 2 (1994). Before the sentence was formally imposed, Kindler filed post-verdict motions with the trial court, but he escaped from the Philadelphia jail while these motions were pending. *Id.*, at 232, 639 A. 2d, at 2. The trial court dismissed Kindler's post-verdict motions, reasoning that because Kindler had voluntarily removed himself from the court's jurisdiction he had

"waived whatever rights he might have had to have his post-verdict motions considered . . . ." *Ibid.*

Seven months after his escape, Kindler was arrested in Quebec, Canada. *Ibid.* The United States requested extradition, but while review was pending, Kindler escaped again. *Ibid.* He remained at large for almost two years. *Ibid.* In 1998, an "America's Most Wanted" broadcast led to Kindler's capture in New Brunswick, Canada. *Ibid.* He was returned to Philadelphia and formally sentenced to death on October 2, 1991. *Id.*, at 231-232, 639 A. 2d, at 1.

On direct appeal, Kindler argued the trial court erred when it dismissed his post-verdict motions. *Id.*, at 232, 639 A. 2d, at 2-3. The Pennsylvania Supreme Court stated the "general rule" that "defendants who are fugitives from justice during the appellate process have no right to any appellate review, even though they have been recaptured and returned to the custody of Pennsylvania." *Id.*, at 232, 639 A. 3d, at 3. On the question of whether to apply this rule to one who escapes during post-verdict motions rather than during appeal, the state court looked to *Ortega-Rodriguez* v. *United States*, 507 U. S. 234 (1993), as persuasive but not binding authority. See *Kindler*, 536 Pa., at 232-233, 639 A. 3d, at 3; see also *Goeke* v. *Branch*, 514 U. S. 115, 119 (1995) (*per curiam*) (*Ortega-Rodriguez* was supervisory, not constitutional, not binding on state courts). The plurality found a sufficient connection between Kindler's escape and the trial court process to warrant dismissal of the post-verdict motions. See 536 Pa., at 233-234, 639 A. 3d, at 3-4. The concurring justices found that the dismissal was within the trial court's discretion. See *id.*, at 243, 639 A. 3d, at 8. With the forfeited issues out of the case, the Pennsylvania Supreme Court proceeded with the limited review it conducts in capital cases regardless of default, and it

found no ground to reverse. See *id.*, at 234-241, 639 A. 3d, at 4-8. This Court denied certiorari. *Kindler* v. *Pennsylvania*, 513 U. S. 933 (1994).

Almost two years later, Kindler filed a motion for post-conviction relief under Pennsylvania's Post-Conviction Relief Act, claiming ineffective assistance of counsel. *Commonwealth* v. *Kindler*, 554 Pa. 513, 520, 722 A. 2d 143, 146 (1998). The Pennsylvania Supreme Court affirmed dismissal of the petition, declining to grant Kindler "an evidentiary hearing on claims already *forfeited* by his flight from captivity . . . ." *Id.*, at 523, 722 A. 2d., at 148 (emphasis in original).

In 2000, Kindler filed a federal habeas corpus petition. See *Kindler* v. *Horn*, 291 F. Supp. 2d 323, 337 (E.D. Pa. 2003). The District Court rejected the state's procedural default argument based on Third Circuit precedent. See *id.*, at 342-343 (quoting *Doctor* v. *Walters*, 96 F. 3d 675, 685-686 (CA3 1996)). The court found that the jury instructions in this case violated the rule of *Mills* v. *Maryland*, 486 U. S. 367 (1988). See 291 F. Supp. 2d, at 351. The court also found fault with the prosecutor's argument contrasting Kindler's leadership role in the conspiracy with codefendant Shaw's follower role. See *id.*, at 358.

The Third Circuit affirmed the district court's grant of habeas relief, 542 F. 3d, at 72, adopting the district court's statement that an adequate state procedural rule "must speak in unmistakable terms, and the state court's refusal to review a petitioner's claim must be consistent with decisions in similar cases." *Id.*, at 79.

This Court granted certiorari on May 18, 2009.

SUMMARY OF ARGUMENT

The case law regarding when a state procedural default rule is "adequate" to preclude review of a federal question in federal court is confused and in need of overhaul. The "varying rubrics" used in the cases to date should be replaced with a relatively simple test that the defendant had notice of the rule and a reasonable opportunity to comply with it.

This standard would serve federal interests better than the "strictly followed" rule, which perversely encourages states to adopt draconian rules of forfeiture. It is consistent with the results, though not the language, of nearly all of this Court's precedents in the area.

The policies behind the federal habeas corpus rules of exhaustion and deference also support the above reformulation. The exhaustion rule requires a defendant to do what he can to obtain a state court ruling on the merits, to which the deference rule of § 2254(d) can apply. The procedural default rule should operate to preclude federal review of the claim where the defendant could have but did not obtain a state ruling on the merits while keeping federal review as a backstop when state procedure unfairly deprives the defendant of a merits determination.

Given the "cause and prejudice" exception for defaulted claims in habeas, it is doubtful whether a separate "adequacy" inquiry is needed at all. Considerable simplification could be achieved by merging the adequacy inquiry into the "cause" prong of the *Sykes* test.

The defendant in this case had more than fair warning that escape was wrongful and could result in forfeiture of his claims. That is all that is needed to decide this case.

ARGUMENT

The Court of Appeals held in the present case that Kindler's default of his claim in state court was inadequate to bar federal habeas review because a prior circuit opinion found that the fugitive forfeiture rule was not being "strictly applied" in Pennsylvania at the time, see *Kindler* v. *Horn*, 542 F. 3d 70, 79 (CA3 2008), and because the state courts had "discretion to reinstate [Kindler's] post-verdict motions" after his recapture. *Id.*, at 80. The notions that a state default rule must be "strictly applied" in order to be "adequate" for this purpose and that it must not be discretionary comes from a combination of two problems. First, the procedural default rule in habeas was tied to the "adequate and independent state grounds" doctrine that applies on direct review of state-court judgments by this Court. Second, that doctrine is deeply confused and needs a major overhaul.

I. "Reasonable opportunity" should be adopted as the test of adequate state procedural grounds, and the prior patchwork of confusing phrases discarded.

A. "An Untidy Area."

Justice Frankfurter once referred to habeas corpus as "an untidy area of our law that calls for much more systematic consideration than it has thus far received." *Sunal* v. *Large*, 332 U. S. 174, 184 (1947) (dissenting opinion). The same could be said today of the "adequate and independent state grounds" doctrine.

The problem of adequate and independent state grounds is common to state-prisoner habeas cases under 28 U. S. C. § 2254 and this Court's direct review of state judgments under 28 U. S. C. § 1257. See *Lee* v.

Kemna, 534 U. S. 362, 375 (2002). Most of this Court's precedents on the subject are in the latter category. These precedents span the entire twentieth century, and they form a haphazard patchwork, offering "Varying Rubrics" for defining inadequacy. See R. Fallon, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 557 (5th ed. 2003) (cited below as "Hart & Wechsler"). The phrases offered up include "without any fair or substantial support," *Ward* v. *Board of Commr's of Love Cty.*, 253 U. S. 17, 22 (1920), "arid ritual of meaningless form," *Staub* v. *City of Baxley*, 355 U. S. 313, 320 (1958), the defendant "could not fairly be deemed to have been apprised of [the rule's] existence," *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 457 (1958), a rule not previously applied "with the pointless severity" of the present case, *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288, 297 (1964), "impos[ing] unnecessary burdens upon [federal] rights," *Brown* v. *Western R. Co. of Ala.*, 338 U. S. 294, 298 (1949), serving "[n]o legitimate state interest," *Douglas* v. *Alabama*, 380 U. S. 415, 422 (1965), "more properly deemed discretionary than jurisdictional," *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229, 234 (1969), "not strictly or regularly followed," *Barr* v. *City of Columbia*, 378 U. S. 146, 149 (1964), and finally, whether "the practice gives to the litigant a reasonable opportunity to have the issue as to the claimed right heard and determined by [the state] court." *Central Union Tel. Co.* v. *Edwardsville*, 269 U. S. 190, 194-195 (1925); *Parker* v. *Illinois*, 333 U. S. 571, 574 (1948) (quoting and following *Central Union*).

One scholar surveying the varying formulations declared that "the governing rules may be discerned less in what the Court has been saying than in what it has been doing." Hill, The Inadequate State Ground, 65 Colum. L. Rev. 943, 944 (1965). More than once, the Court has used broad language to declare a state

ground inadequate and then refused to review a claim in a later case that would seem to come within that language, never explaining the apparent inconsistency.

Davis v. *Wechsler*, 263 U. S. 22, 23 (1923), involved a jurisdictional objection based on an executive order implementing a federal statute. The objection was rejected by the state court on the ground that the objecting party had waived it by entering a general appearance, even though the pleading making the appearance clearly stated the objection. *Id.*, at 24. Justice Holmes, in often-quoted language, rejected the contention that this ground blocked Supreme Court review. "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Ibid.*

This statement seems to imply a sweeping authority to disregard state procedural defaults, so long as the objection is "plainly and reasonably made." The appellant in *Central Union*, *supra*, thought so. It had forfeited its constitutional claims, under well-established Illinois rules, by taking its appeal to the intermediate appellate court rather than the Illinois Supreme Court. 269 U. S., at 193-194. There was nothing unplain or unreasonable about its statement of its claims. Yet the Court held that the state procedural default ground was adequate, stating the "reasonable opportunity" standard quoted *supra*, at 7. The two cases were decided only two years apart. Both were unanimous. Eight Justices participated in both cases, including the authors of both opinions. Yet there is no explanation of why a claim that seems to come within the language of *Davis* was rejected in *Central Union*.

Barr v. *City of Columbia*, 378 U. S., at 149, claimed that its "strictly or regularly followed" standard re-

flected established precedent. This is an overstatement, to put it mildly, see Hill, *supra*, at 962, n. 71, unsupported by the earlier cases. *Barr* cites four cases for this proposition, yet the word "strictly," which has been the source of much mischief since *Barr*, does not appear in the statement of the rule in any of the four. *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S., at 457-458, sets forth the novelty/fair notice standard. *Wright* v. *Georgia*, 373 U. S. 284, 291 (1963), and *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S., at 301, quote *Patterson*. *Shuttlesworth* v. *Birmingham*, 376 U. S. 339 (1964), is a summary reversal citing *Williams* v. *Georgia*, 349 U. S. 375 (1955), but not otherwise stating a test. *Williams* was a case of discriminatory use of a discretionary power, such that "the state court action in the particular circumstances is, in effect, an avoidance of the federal right." *Id.*, at 383 (footnote omitted). The "strictly" requirement in *Barr* was a bolt from the blue, and, as discussed *infra*, at 14-15, and 28-29, one that can cause perverse results if taken literally.

In *Walker* v. *Birmingham*, 388 U. S. 307, 319 (1967), the Court described *Barr* as a case "where a state court has followed a regular past practice of entertaining claims in a given procedural mode, and without notice has abandoned that practice to the detriment of a litigant who finds his claim foreclosed by a novel procedural bar." If *Barr* itself had used these words, instead of its unprecedented and unnecessary "strictly" language, much confusion could have been avoided.

Some cases in the series reach eminently sensible results on their facts, entirely consistent with precedent, yet inexplicably assert indefensible and unprecedented rationales for them. *Sullivan*, *supra*, is the worst of this lot. The state ground was indeed inadequate because, as Justice Harlan explained in dissent, the appellant had no reason to believe that the proce-

dure he followed was not in compliance. See 396 U. S., at 245-247 (applying the *Patterson* novelty standard). Instead of applying this well-established standard, the *Sullivan* majority made the breathtaking assertion that all rules involving the exercise of discretion are inadequate. See *id.*, at 234; see also *infra*, at 14 (quoting Wright, et al., critique of *Sullivan*). Although *Williams* v. *Georgia*, 349 U. S., at 389, also was based on the discretionary nature of the rule, it was the discriminatory use of that discretion, rather than the mere existence of discretion, that enabled federal review. See *id.*, at 383.

A single, coherent standard is long overdue. The standard should accommodate the need to respect state procedures while recognizing the responsibility of the states to provide meaningful remedies for federal claims, and opening the door to federal relief when they do not. Respect for *stare decisis* also requires a standard consistent with the results in most of the precedents. That standard, *amicus* submits, can be formed by combining *Patterson*'s "fairly . . . apprised" with *Central Union*'s "reasonable opportunity." That is, the claimant should have fair notice that the rule exists and applies to the circumstances, and he should have a reasonable opportunity to present his federal claim. See 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4027, pp. 386-387, 392 (2d ed. 1996). Nothing more is required.[2]

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2. In a criminal case, if trial counsel fails to use the reasonable opportunity, that may form the basis of an ineffective assistance claim, either as an independent claim or as "cause" for the default. That claim, in turn, must be presented to the state courts at the proper time, if one is provided. See *Edwards* v. *Carpenter*, 529 U. S. 446, 452 (2000). In a civil case, a malpractice suit would be the remedy.

B. Policy Reasons.

There are solid policy reasons for federal courts to respect the procedural rules of state courts. See *Coleman* v. *Thompson*, 501 U. S. 722, 745-747 (1991). In our federal system, state courts must necessarily adjudicate federal questions, because it would be impractical to remove every case with a federal issue to federal court. Practical considerations also preclude having two different sets of procedural rules: one for state issues and another for federal. See Wright, Miller, & Cooper, *supra*, § 4021, at 302. A single objection will often have both state and federal grounds, such as the hearsay rule and the Confrontation Clause or the Takings Clause of the Fifth Amendment and a parallel provision of the state Constitution. Having two different sets of rules for the time to raise a single objection would be chaotic.

On habeas corpus, there are additional reasons for recognizing and giving effect to state procedural default rules. These are discussed in Part II, *infra*.

Balanced against these considerations are "the federal interests in protecting federal rights against bad procedure." Wright, Miller, & Cooper, *supra*, § 4021, at 302. Underlying many of the old cases is a strong, if unstated, suspicion of state-court hostility to the underlying federal law. It is no coincidence that the most sweeping statements come in cases of black defendants and the NAACP from the South at the height of the civil rights struggle. See Sandalow, Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine, 1965 Sup. Ct. Rev. 187, 190; see also Glennon, The Jurisdictional Legacy of the Civil Rights Movement, 61 Tenn. L. Rev. 869, 885-902 (1994) (describing how state grounds doctrine shifted during the civil rights struggle and has since shifted back). Fortunately, this era is behind us, and has been for

some time. See *Stone* v. *Powell*, 428 U. S. 465, 493-494, n. 35 (1976). This is not to say the Court was wrong to do what it did in the 1960s. Great struggles may require drastic measures, but when the crisis is over we should return to the normal modes of procedure. See *Ex parte Milligan*, 4 Wall. (71 U. S.) 2, 109 (1866).

Conscious hostility is not the only danger to federal rights, however. Sometimes a generally fair rule can operate in an unfair manner in a particular case, cutting a party off without a realistic opportunity to make its case. See *Michel* v. *Louisiana*, 350 U. S. 91, 95 (1955). For example, *Hathorn* v. *Lovorn*, 457 U. S. 255, 262-263 (1982), involved a rule against raising new issues in a petition for rehearing. This is generally a fair and unobjectionable rule. In the particular case, though, the state court had salvaged a facially unconstitutional statute through drastic and unexpected surgery, see *id.*, at 258-259, thereby raising a different federal question from the one originally presented. As a practical matter, the petition for rehearing was the first opportunity to raise this claim. Federal rights need protection from an unreasonable refusal to make a needed exception to a normally fair rule.

A possibly separate class of default cases consists of those where the defendant did make the federal claim to the trial court and received an adverse ruling on it, and then an appellate court held that the claim was defaulted by failure to make a "repetition of a patently futile objection." *Douglas* v. *Alabama*, 380 U. S. 415, 422 (1965). In *Douglas*, the objection was so clearly sufficient, see *id.*, at 421-423, and n. 4, as to raise a suspicion of intentional discrimination against the federal right. In *Lee* v. *Kemna*, 534 U. S. 362, 381 (2002), counsel did not follow up his oral motion for a continuance with a written one after the trial judge had denied the oral motion on substantive grounds with no

objection to the form. Two alternative bases for the *Lee* holding are that Lee lacked fair notice that the rule applied to the circumstances, see *id.*, at 382, and that under the circumstances he did not have a reasonable opportunity to comply. See *id.*, at 382-383. In *Osborne* v. *Ohio*, 495 U. S. 103, 124 (1990), a pornography case, counsel had failed to request jury instruction on a constitutionally required element after the trial judge had ruled definitively that the element was not required. The default discussion in this case is brief, and the Court did not explore whether the defendant had adequate notice and opportunity.

Another situation which still arises on occasion is the inherently fair rule that is unfairly applied retroactively. A state may legitimately specify *in advance* which of two possible remedies a claimant must pursue, but it cannot "bait and switch." See *Reich* v. *Collins*, 513 U. S. 106, 111 (1994). Similarly, there is a federal interest in protecting federal rights from unforeseeable applications of existing rules. See *supra*, at 9-10 (discussing *Sullivan*). A competent lawyer should be able to discern the contours of the rule with sufficient clarity that he or she knows what to do to safely preserve the claim. See *Walker* v. *Birmingham*, 388 U. S., at 320 (petitioners "on notice" of the correct procedure and not "entrapped or misled"). That does not mean that the boundaries of the rule must be so crisp that the lawyer can confidently skate on the edge. There are good reasons for rules to be flexible, and flexibility necessarily creates fuzzy boundaries. Fair notice means that a procedure that appears to be in *clear* compliance cannot suddenly be declared to be a default.

However, there is *no* federal interest in compelling or even encouraging the states to purge all discretion from the operation of their procedural default rules. This is the perverse incentive of opinions such as the

majority in *Sullivan* v. *Little Hunting Park, Inc.*, *supra*.

> "The possible implication in the Sullivan opinion that discretionary state grounds cannot provide adequate reason to refuse to consider a federal question is unwarranted. There are many valid reasons for framing procedural rules in general, 'discretionary' terms. Precisely defined rules cannot take account of the gravity of a procedural failure, the strength of the excuses offered, or the importance of the procedural and substantive consequences of excusing or punishing the failure. In many circumstances, appellate courts invest lower courts with discretion both because of a belief that a better decision will result, and because of a conviction that in any event the matter does not justify the institutional cost of plenary review. Although there is a modest risk that discretionary procedural sanctions may be invoked more harshly against disfavored federal rights, that does not warrant blanket disregard of state procedure. Instead, the discretionary nature of the state rule may be considered in applying the better tests of adequacy set out in the next section. If discretion has been exercised to impose novel and unforeseeable requirements without fair or substantial support in prior state law, or to deny a fair opportunity to present federal claims, the state ground may be found inadequate." Wright, Miller, & Cooper, *supra*, § 4026, at 385-386.

Along the same line, there is no federal interest in denying effect to any state procedural rule which is not "strictly" applied in the sense of iron-clad severity. Again, such a formulation provides a perverse incentive for states to make their default rules more severe and less flexible than the state might otherwise choose. "The Court should continue to recognize that sound

procedure often requires discretion to exact or excuse compliance with strict rules, and ordinarily should leave the discretion to state courts." *Id.*, § 4028, at 403.

Dugger v. *Adams*, 489 U. S. 401 (1989), illustrates that this Court does not apply the "strictly" requirement literally. The dissent argued that the Florida Supreme Court had reached the merits in two other cases despite the same default, and therefore, under *Barr*, the state rule was inadequate. *Id.*, at 416-419 (Blackmun, J., dissenting). The majority rejected this argument, noting that the rule was applied in "the vast majority of cases." *Id.*, at 411, n. 6. The Court noted that even though the failure to clearly state the procedural default in a few cases would permit federal habeas review in those particular cases, it would not "undercut the adequacy" of the rule in general. *Id.*, at 412, n. 6.

No doubt in the mid-1960s there was a legitimate concern underlying the apparent distrust of discretionary or less-than-strict rules. That was the suspicion they were being used discriminatorily against federal rights, civil rights organizations, and black criminal defendants. See Glennon, 61 Tenn. L. Rev., at 895 (noting "state court efforts to use their procedural rules to impede the civil rights movement"). Over 40 years later, that possibility may not have vanished entirely, but it is a faint shadow of what it was in 1964. Today, the cure is far worse than the disease. Flexibility and discretion in the application of default rules should be encouraged, not discouraged.

If the state courts really did exercise discretion so as to discriminate on the basis of race or against fundamental rights, that would be a violation of the Equal Protection Clause by itself. A requirement of truly strict application could only be justified as a kind of conclusive presumption to relieve the claimant of the difficult burden of proving discrimination. Such

presumptions should only be used where they produce the correct result most of the time. See *Coleman* v. *Thompson*, 501 U. S., at 737. Presuming discrimination from a lack of iron rigidity in the application of default rules would reach the wrong result nearly all of the time.

In general, then, the requirements of fair notice and a reasonable opportunity to comply accommodate all the important policy considerations. Two supplemental rules should also be recognized to deal with unusual situations: a state rule should not be allowed to defeat the policy of a pertinent federal statute, and actual, invidious discrimination in the application of a state rule independently violates the Equal Protection Clause.

C. Consistency with Precedent.

As we noted earlier, respect for *stare decisis* requires that any restatement of the doctrine of adequate and independent state grounds be as consistent as possible with precedent. No coherent theory could possibly embrace the widely disparate language of the precedents, but it is possible to reconcile all but two of the major cases on their facts. "It is black letter law that the holding of a case is determined by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them." *People* v. *Davis*, 7 Cal. 4th 797, 823, 872 P. 2d 591, 608 (1994) (Mosk, J., dissenting) (internal quotation marks omitted). Hence, consistency with the material facts is at least as important as consistency with the language.

First, we can put to one side those cases in which the state rule operates contrary to the policy of a federal statute or regulation. *Davis* v. *Wechsler*, 263 U. S. 22 (1923), belongs in this category. That case involved a suit against a railroad under federal control,

and it was brought in violation of a federal executive order prescribing the venue of such suits. See *id.*, at 23; see also *Alabama & Vicksburg R. Co.* v. *Journey*, 257 U. S. 111, 112-114, and n. 1 (1921) (quoting and upholding the order). The purpose of the order was to divest the court of authority to hear the case at all, so the policy considerations supporting respect for state procedure, see *supra*, at 11, diminish to the vanishing point. It would defeat the policy of the order and the statute it implemented to allow a minor misstep in local procedure to subject a federally controlled entity to suit in a court where the case never should have been. Taking a limited view of *Davis*, such as this one, is necessary to reconcile it with *Central Union Tel. Co.* See *supra*, at 8.[3] *Brown* v. *Western R. Co. of Ala.*, 338 U. S. 294 (1949), can be considered in the same special class. "*Brown* did not involve a pleading problem at all but rather a misconception by the state court as to the governing substantive [federal statutory] law." Hill, *supra*, 65 Colum. L. Rev., at 973.

The federal statute cases aside, we turn to the facts of other cases. The easiest cases are those where the state rule, as applied, is so grossly unfair as to violate due process. *Reece* v. *Georgia*, 350 U. S. 85 (1955), is the exemplar of this group. The indigent defendant's time to challenge the composition of the grand jury expired before counsel was appointed. See *id.*, at 88-90. This is obviously not a reasonable opportunity to state his federal claim, however clearly established the rule might have been.

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3. An alternative limited view of *Davis* is that the state court's procedural ruling was novel and surprising. See Hill, *supra*, 65 Colum. L. Rev., at 975-976. If Professor Hill is correct, the *Davis* holding on its facts is consistent with our proposed general standard.

Cases involving new rules unfairly applied retroactively fit with our proposed requirement of fair notice. These include *Ford* v. *Georgia*, 498 U. S. 411, 424 (1991), *Johnson* v. *Mississippi*, 486 U. S. 578, 587-589 (1988) (state case law at the time of the "default" indicated that the procedure defendant used was proper), and *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 457 (1958) ("petitioner could not fairly be deemed to have been apprised of [the rule's] existence"). *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673, 677-678 (1930), found that the retroactive application of a new rule defaulting the federal claim was a due process violation, so this case fits both categories.

Closely related are those cases where the state rule was clearly established before the "default," but the procedure followed by the federal claimant appeared to be in compliance with the rule as applied up to that time. These include the infamous *Rogers* v. *Alabama*, 192 U. S. 226, 229-230 (1904) (two-page motion stricken as "prolix"), *Sullivan* v. *Little Hunting Park*, discussed *supra*, at 9, and *Barr* v. *City of Columbia*, 378 U. S. 146, 149 (1964). In *Barr*, the state court had held that the objection was "too general to be considered." *Ibid*. Yet, this Court noted, in four other nearly contemporaneous cases, the state court had considered equally general objections and, significantly, had *granted* relief in two of those cases. See *ibid*. Cases granting relief are more significant than cases reaching the merits but denying relief.[4] In *James* v. *Kentucky*,

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4. A decision to deny a clearly meritless claim on the merits rather than deal with a difficult procedural question may be justified as a simple matter of judicial economy. See *Lambrix* v. *Singletary*, 520 U. S. 518, 525 (1997). Such a sensible procedure should not be considered a failure to regularly enforce the rule.

466 U. S. 341, 346-348 (1984), the preexisting case law was too confused to give fair notice that defendant had to ask for an "instruction" rather than an "admonition" under the circumstances. In *Staub* v. *City of Baxley*, 355 U. S. 313, 320 (1958), the Court noted "a long line" of decisions permitting motions like the defendant's. The second of the alternative bases of *Lee*, 534 U. S., at 382, also fits in this category. In *Douglas*, 380 U. S., at 421-422, defense counsel was assured by the prosecutor that his objection was sufficient.

Douglas, *Osborne*, and *Lee* may all be categorized as "futile repetition" cases. Only *Osborne* actually depends on this ground, however. *Douglas* and *Lee* may be considered inadequate notice cases, see *supra*, and *Lee* may be considered an inadequate opportunity case. See *infra*. A "futile repetition" prong of the adequacy test would be needed only to be consistent with the result in *Osborne*. This minor point in a single case, only briefly considered in the opinion, is insufficient to warrant maintaining a separate exception.

Finally, there are the cases where the rule as applied denies a reasonable opportunity to present the federal claim, however well established it may be and however fair it may be in most cases. *Hathorn* v. *Lovorn*, 457 U. S. 255 (1982), illustrates this category. The petition for rehearing in that case was the first opportunity to present the federal question as a practical matter. See *supra*, at 12. Regardless of whether the state rule against raising new issues on petition for rehearing violated due process as applied, the plaintiffs did not have a fair opportunity to present their claim, and hence the state ground was not adequate to bar federal review. In *Ward* v. *Board of Commr's of Love Cty.*, 253 U. S. 17, 23 (1920), the "coercive means" used by local authorities to illegally tax exempt Indian land had left the Indians with no reasonable opportunity to make the

prepayment challenge the state required. *Lee* v. *Kemna*, *supra*, also fits in this category. See *supra*, at 12; see also Brief for Petitioner 33.

One case that cannot be reconciled on its facts is *Henry* v. *Mississippi*, 379 U. S. 443 (1965). That case involved a contemporaneous objection rule. *Id.*, at 445-446. The defendant did not object to certain evidence when it was introduced, although he did later. *Ibid.* The actual holding of this confusing case was to remand to the state court with an invitation to adopt the "deliberate bypass" standard of *Fay* v. *Noia*, 372 U. S. 391 (1963), for its own procedural default rule. See *Henry*, *supra*, at 453.[5]

Henry's deficiencies were obvious at the time and were cataloged in Justice Harlan's dissent, *id.*, at 457-465, and Professor Hill's article, *supra*, 65 Colum. L. Rev., at 982-992. Today, there are additional reasons the Court should not be too concerned with *Henry* as precedent. The decision itself is routinely ignored. See *supra*, at 8; *Lee*, 534 U. S., at 394 (Kennedy, J., dissenting). Most importantly, though, *Henry* is heavily dependent on *Fay* v. *Noia*, which has since been overruled. See Wright, Miller, & Cooper, *supra*, § 4020, at 282, 291. At this point, *Henry* has so little value as precedent that it should not prevent the formulation of a coherent standard.

In summary, a coherent standard of "adequate" state grounds is needed to replace the existing patchwork for state procedural default rules. An adequate state procedural rule is one that gives fair notice that the rule exists and applies, and provides a reasonable

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5. The state court declined the invitation. This Court denied certiorari, superfluously adding that the denial was without prejudice to habeas relief, and Henry subsequently obtained habeas relief. See Glennon, 61 Tenn. L. Rev., at 898-899.

opportunity to present the claim. This standard embraces the important policy considerations and is consistent with all but two of the precedents, one of which should no longer be considered a valid precedent.

II. The purpose behind the habeas procedural default rule is better served by a focus on reasonable opportunity than on strict application.

A. *A Secondary and Limited Procedure.*

"Habeas corpus 'is designed to guard against *extreme malfunctions* in the state criminal justice systems.' " *Brecht* v. *Abrahamson*, 507 U. S. 619, 634 (1993) (emphasis added) (quoting *Jackson* v. *Virginia*, 443 U. S. 307, 332, n. 5 (1979) (Stevens, J., concurring in the judgment)). This role is "secondary and limited." *Barefoot* v. *Estelle*, 463 U. S. 880, 887 (1983). Keeping federal habeas confined to that role has been a continuing challenge for both Congress and this Court for well over a century. The first limitation to be imposed was the exhaustion rule. See Forsythe, The Historical Origins of Broad Federal Habeas Review Reconsidered, 70 Notre Dame L. Rev. 1079, 1121-1123 (1995).

Prior to the period of *de novo* review, exhaustion was much more than a rule of timing. Its purpose was to require the defendant to go to the state courts for a ruling on the merits which would, in most cases, be the last full examination of the case. "[A] federal court will *not ordinarily re-examine* upon writ of habeas corpus the questions thus adjudicated." *Ex parte Hawk*, 321 U. S. 114, 118 (1944) (*per curiam*) (emphasis added). Relitigation in federal court was limited to cases where "the remedy afforded by state law proves in practice unavailable or seriously inadequate . . . ." *Ibid.*; see also *Fay* v. *Noia*, 372 U. S. 391, 459-460 (1963) (Harlan, J.,

dissenting). This is the rule Congress understood it was endorsing when it codified the exhaustion rule in 1948. See *Darr* v. *Burford*, 339 U. S. 200, 211 (1950); *Rose* v. *Lundy*, 455 U. S. 509, 516 (1982).

Brown v. *Allen*, 344 U. S. 443 (1953), is the case generally credited with (or blamed for) abandoning the rule of deference and establishing *de novo* review as the norm. See, *e.g.*, *Noia*, 372 U. S., at 460 (Harlan, J., dissenting); Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 154-155 (1970); but see *Wright* v. *West*, 505 U. S. 277, 287-288 (1992) (opinion of Thomas, J.) (disputing that *Brown* actually held that); Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Wright* v. *West*, No. 91-542, pp. 14-16 (same). Judge Friendly attributes the abandonment of this rule and the establishment of *de novo* review on federal habeas to "the growth of the country and the attendant increase in the Court's business," so that the Court "had to summon the inferior federal judges to its aid" to correct errors in state courts. Friendly, *supra*, at 155. While growth of the country may be part of the explanation, there can be no doubt that state court resistance to civil rights and to the greatly expanded rights for criminal defendants in the 1950s and 1960s was also a major factor. By the mid-1970s, this hostility to federal rights had abated, see *Stone* v. *Powell*, 428 U. S. 465, 493, n. 35 (1976), and a period of retrenchment began, culminating in the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 933-940, 953 (1998).

AEDPA made many changes to habeas corpus law, but the most important was the abrogation of the rule of *de novo* review. See *Williams* v. *Taylor*, 529 U. S. 362, 404 (2000). Simultaneously, Congress strength-

ened the exhaustion rule, specifying that the state could expressly waive the rule, but not inadvertently default it. See 28 U. S. C. § 2254(b)(3). Congress must have considered exhaustion to be a vitally important policy to make it one of the few defenses in the law which cannot be lost by failure to assert it. The reason lies in how three rules—exhaustion, default, and deference—fit together to restrain federal habeas from substituting for state appeal.

B. Three Interlocking Pieces.

In *O'Sullivan* v. *Boerckel*, 526 U. S. 838 (1999), both the majority opinion and Justice Stevens' dissent addressed the "interplay" of the exhaustion and procedural default rules. See *id.*, at 848. The majority agreed with the dissent that

> "a prisoner could evade the exhaustion requirement—and thereby undercut the values that serves—by 'letting the time run' on state remedies. *Post*, at 853. To avoid this result, and thus 'protect the integrity' of the federal exhaustion rule, *ibid.*, we ask not only whether a prisoner has exhausted his state remedies, but also whether he has *properly* exhausted those remedies, *i.e.*, whether he has fairly presented his claims to the state courts, see *post*, at 854." *Ibid.* (emphasis in original).

The *O'Sullivan* dissent's assertion that the two rules are "analytically distinct," *id.*, at 850, is an overstatement. The fact that one of the principal purposes of the procedural default rule is to protect the integrity of the exhaustion rule necessarily ties the two together. Indeed, in *Daniels* v. *Allen*, the companion case to *Brown* v. *Allen*, *supra*, the Court at one point appears to consider the default rule to be simply one aspect of the exhaustion rule.

> "We have interpreted § 2254 as not requiring repetitious applications to state courts for collateral relief, p. 447, *supra*, but clearly the state's procedure for relief must be employed in order to avoid the use of federal habeas corpus as a matter of procedural routine to review state criminal rulings. A failure to use a state's available remedy, in the absence of some interference or incapacity, such as is referred to just above at notes 32 and 33, bars federal habeas corpus. The statute requires that the applicant exhaust available state remedies. To show that the time has passed for appeal is not enough to empower the Federal District Court to issue the writ." *Brown*, 344 U. S., at 487.

At another point in the opinion, though, the Court seemed to adopt an independent state grounds rationale. See *id.*, at 458; see also *Fay* v. *Noia*, 372 U. S., at 461-462 (Harlan, J., dissenting). The opinion of the Court in *Fay*, *supra*, at 433-435, rejected both independent state grounds and exhaustion as bases for the procedural default rule, omitting any mention of the contrary alternative holdings in *Brown* noted in the dissent. *Fay* was effectively overruled[6] in *Wainwright* v. *Sykes*, 433 U. S. 72, 86-88 (1977), which adopted the independent and adequate state ground rationale for the procedural default rule and simultaneously adopted the "cause and prejudice" exception.

Basing the default rule on independent state grounds rather than failure to exhaust makes the habeas rule different in theory from the rule in administrative law, but *Woodford* v. *Ngo*, 548 U. S. 81, 92-93 (2006), indicated that the difference is merely one of "terminology." On either theoretical ground, the

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6. The official overruling came in *Coleman* v. *Thompson*, 501 U. S. 722, 750-751 (1991).

question is whether the would-be federal litigant has *properly* exhausted the primary remedy before turning to the federal courts. Compare *O'Sullivan*, 526 U. S., at 848, with *Woodford*, *supra*, at 93.

If the procedural default rule is important to protect the integrity of the exhaustion rule, we must ask why the exhaustion rule itself is important. The traditional explanation is that the purpose of the rule is to give "an opportunity to the state courts to correct a constitutional violation" before a federal court intervenes. *Darr*, 339 U. S., at 204. However, in *Coleman* v. *Thompson*, 501 U. S. 722 (1991), this Court clarified that the States themselves, not the state courts, are the focus of concern.

> "State courts presumably have a dignitary interest in seeing that their state law decisions are not ignored by a federal habeas court, but most of the price paid for federal review of state prisoner claims is paid by the State. When a federal habeas court considers the federal claims of a prisoner in state custody for independent and adequate state law reasons, it is the State that must respond. It is the State that pays the price in terms of the uncertainty and delay added to the enforcement of its criminal laws. It is the State that must retry the petitioner if the federal courts reverse his conviction." *Id.*, at 738-739.

The exhaustion rule, complemented by the procedural default rule, enhances the finality of state court judgments by requiring the defendant to make his objection known early in the process. Finality is delayed and cost is increased if the defendant is allowed to pursue his state appeals with one set of arguments and, when those are unsuccessful, proceed in federal court with a new set of arguments. Even before AEDPA, habeas petitioners were normally required to

present the factual basis of the claim to the state courts, and the state courts' findings on those facts were presumed to be correct. See 28 U. S. C. § 2254, former subd. (d) (1994 ed.).

With the enactment of AEDPA, the exhaustion and procedural default rules not only reinforce each other, but they now serve the additional purpose of protecting the integrity of the "deference" standard of 28 U. S. C. § 2254(d). After AEDPA, it is once again the exception rather than the norm for a question decided in state court to be decided again in federal court, as it was before *Brown* v. *Allen*. See Scheidegger, 98 Colum. L. Rev., at 946; *supra*, at 21-22. If the state court decided the merits, then the federal court need only satisfy itself that the state court's decision is neither contrary to nor an unreasonable application of Supreme Court precedent. At that point the habeas case is over, and the federal court need not decide the underlying question. See, *e.g.*, *Lockyer* v. *Andrade*, 538 U. S. 63, 71 (2003); *Woodford* v. *Visciotti*, 537 U. S. 19, 27 (2002) (*per curiam*).[7] Only by such shortening of the decision process would this section achieve Congress's goal in enacting it, to reduce delay. See *Williams* v. *Taylor*, 529 U. S., at 404.

C. Procedural Default and Habeas Policy.

The preferred mode of proceeding is for the criminal defendant to present his federal claim to the state courts in the manner required by state law and receive a ruling on the merits. If the ruling is in his favor, the case never reaches federal court. If the ruling is against

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7. The habeas court *may* decide the merits first, as a correct decision is necessarily a reasonable decision, see *Weeks* v. *Angelone*, 528 U. S. 225, 231-237 (2000), but this will typically not be the most efficient method.

him, the threshold questions in federal court are whether the state ruling is contrary to clearly established law, an unreasonable application of that law, or based on an unreasonable finding of the facts. See 28 U. S. C. § 2254(d). Those questions can and should be answered solely on the state court record, providing prompt resolution of most habeas cases. See Brief for the Criminal Justice Legal Foundation as *Amicus Curiae* in *McDaniel* v. *Brown*, No. 08-559, pp. 8-19. Proceeding in this mode will implement the goal of Congress in enacting AEDPA to limit relitigation. See *Williams* v. *Taylor*, 529 U. S., at 404; Scheidegger, 98 Colum. L. Rev., at 946.

The exhaustion rule reinforces the deference rule by requiring the defendant to go to the state courts first. The procedural default rule reinforces the exhaustion rule by requiring him to go *properly* to the state courts first. See *supra*, at 25. The exceptions to the deference rule *and* the procedural default rule implement the policy of keeping habeas available to correct "extreme malfunctions" in the state court proceedings. The exceptions to the deference rule provide relief in cases where the state ruling on the *merits* is outside the bounds of reasonable disagreement. The exceptions to the exhaustion and procedural default rules provide relief where the state system has *procedurally* denied the defendant a fair opportunity to obtain a ruling on the merits. For exhaustion, this principle is expressly stated in the statute. See 28 U. S. C. § 2254(b)(1)(B).

Ideally, no defendant would ever qualify for an exception to the procedural default rule. All state rules should be adequate, and a defendant with good cause and resulting prejudice or a strong showing of actual innocence should qualify for an exception to the state's own default rule. While perfection is unattainable, the federal rule should encourage state systems to move in

that direction. Instead, the perverse "strictly followed" rubric does just the opposite.

At oral argument last term in *Bell* v. *Kelly*, Justice Breyer expressed surprise that Virginia's default rule had no exception for new evidence, that the defendant could not have discovered earlier, that "shows the whole trial was a farce . . . ." Tr. of Oral Argument in *Bell* v. *Kelly*, No. 07-1223, pp. 16-17. Why would a state court or legislature enact such a harsh, uncompromising, potentially cruel rule? Because the "strictly followed" standard threatens disregard of state rules by federal courts as punishment for the sin of being too generous to defendants.

For example, Ohio does have a "good cause" exception to its procedural default rule. In *Richey* v. *Mitchell*, 395 F. 3d 660, 680 (CA6 2005), reversed on other grounds in *Bradshaw* v. *Richey*, 546 U. S. 74 (2005) (*per curiam*), the Sixth Circuit declared this rule "inadequate" because " 'the state courts have not achieved consensus on what constitutes "good cause" to excuse noncompliance with rule 26(B).' " Of course they haven't, and they never will. Exceptions such as "good cause" must necessarily be elastic. See *supra*, at 14. In the absence of any evidence that exceptions are being applied in a discriminatory manner, declaring a state rule to be inadequate because exceptions have been made for other defendants is contrary to the policy behind the default rule.

The overarching goal of AEDPA was to streamline federal habeas proceedings, and the exhaustion rule was strengthened to advance that goal. See *Rhines* v. *Weber*, 544 U. S. 269, 277 (2005). It *should* go without saying that an interpretation of the exhaustion and default rules that spawns collateral litigation on top of collateral litigation cannot be correct. Yet the Ninth Circuit did exactly that in *Bennett* v. *Mueller*, 322 F. 3d

573, 583-584 (2003), where it remanded a habeas case to the district court for an inquiry having nothing to do with Bennett's individual case but rather to investigate whether the California courts had applied the state's clearly stated and easily followed timeliness rule with sufficient consistency to be considered "adequate."[8] Such squandering of limited judicial resources must stop.

The "extreme malfunction" that federal habeas should protect against occurs when a defendant has been trapped into forfeiting his federal claim by a state rule that fails to give fair notice or a reasonable opportunity to comply. The adequacy test need go no further. State rules with insufficient exceptions can be dealt with under the cause and prejudice test.

III. For habeas, the "adequacy" inquiry could be merged into the *Sykes* "cause" inquiry.

In Part I of this brief, we propose a reformulation of the "adequate state grounds" rule applicable to direct review and habeas alike. However, there is already an important difference between direct review and habeas. The habeas variant of the rule has exceptions for "cause for the default and prejudice from the asserted error" and miscarriages of justice. *House* v. *Bell*, 547 U. S. 518, 536 (2006).

Lack of fair notice that a rule exists and applies to the situation is certainly cause not to comply with it. So, too, is a situation that makes compliance impractical. The "prejudice" prong of the test is no longer a major impediment to claims that would otherwise

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8. We understand this issue will be discussed in greater detail in the brief for *amici* States.

qualify for relief since *Brecht* v. *Abrahamson*, 507 U. S. 619 (1993), raised the bar on harmless error review.

Given these realities, one might well ask why a separate adequacy inquiry is needed at all. Cf. *Strickler* v. *Greene*, 527 U. S. 263, 282 (1999) (merger of *Brady* materiality with *Sykes* prejudice inquiry). A much needed simplification of the complex jurisprudence of habeas corpus could be achieved by simply saying that the two exceptions noted in *House*, *supra*, are the only exceptions and dispensing with the superfluous adequacy inquiry.

IV. A case squarely on point is not required to give fair notice.

In arguing that the state rule was not clearly established, Kindler notes that there have been some changes in the fugitive disentitlement rule in Pennsylvania, as the Pennsylvania Supreme Court has worked its way through various permutations of what stage of proceedings is pending when the prisoner escapes, when that proceeding is dismissed, and when the fugitive is recaptured. See Brief in Opposition 6-8.

In a legal system where law is made largely through judicial decisions in cases, this is a normal process. The question should not be whether every "t" was crossed and every "i" dotted at the time of the default. That would be an impossible standard. The appropriate question is whether the law at the time Kindler escaped failed to give him fair warning that forfeiture of his claims was a possible consequence.

Rules that specify the consequences of failure to follow the correct procedure need not be laid out with the same exactitude as the rules that define a criminal offense. Cf. *Rogers* v. *Tennessee*, 532 U. S. 451, 469-470

(2001) (Scalia, J., dissenting) (discussing "fair warning" in that context). Changes in the law, or clarifications of unsettled points, are less problematic in matters of procedure than in regulation of primary conduct. See *Landgraf* v. *USI Film Products*, 511 U. S. 244, 275 (1994); *Republic of Austria* v. *Altmann*, 541 U. S. 677, 696 (2004).

State law needs to give the defendant fair notice of the correct mode of proceeding and fair warning that loss of the claim is a possible consequence of proceeding incorrectly. In this unusual case, escape from custody was not only clearly wrong procedure, it was a crime. The fugitive disentitlement rule provided fair notice of forfeiture as a possible consequence, see Brief for Petitioner 36-42, even if the precise point in this case had yet to be decided. The state did not set a "springe," cf. *supra*, at 8, and Kindler has not been treated unfairly. That is all that is needed to decide this case.

CONCLUSION

The decision of the United States Court of Appeals for the Third Circuit should be reversed.

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Respectfully submitted,

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